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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 28.

AMERICAN TOBACCO COMPANY, PLAINTIFF IN ERROR,

vs.

EMIL WERCKMEISTER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 8, 1908.

(20,248.)

(20,246.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 5, 1906.

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a United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN TOBACCO COMPANY, Plaintiff in Error (Defendant Below),

vs.

EMIL WERCKMEISTER, Defendant in Error (Plaintiff Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Southern District of New York.

[Stamped:] United States circuit court of appeals, second circuit William Parkin, clerk. Filed Aug. 4 1905.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Emil Werckmeister, as plaintiff, and American Tobacco Company, as defendant, a manifest error hath happened, to the great damage of the said American Tobacco Company, as plaintiff in error, as is said and appears by the complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 13th day of March, 1905, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be
2 done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to 132 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of American Tobacco Company, Plaintiff in Error, against Emil Werckmeister, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of May, in the year of our Lord one thousand nine hundred and five and
3 of the Independence of the United States the one hundred and twenty-ninth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:)—The U. S. Circuit Court of Appeals for the Second Circuit.—American Tobacco Company, Plaintiff in Error, *vs.* Emil Werckmeister, Defendant in Error.—Orig. Writ of Error.—Wetmore & Jenner, Attorneys for Plaintiff in Error, 34 Pine St., New York, N. Y.—Due service of a copy of the within Writ of Error is hereby admitted this 6th day of February, 1905.—Briesen & Knauth, Attorneys for Defendant in Error.—U. S. Circuit Court, Southern District, New York.—Filed Feb. 24, 1905.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER
against
AMERICAN TOBACCO COMPANY.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney
4 within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 20th day of June, in the year one thousand nine hundred and two.

[L. S.] JOHN A. SHIELDS, *Clerk.*

BRIESEN & KNAUTH,
Plaintiff's Attorneys.

Office and Post Office Address, 49 Wall St., Borough of Manhattan, New York City.

Circuit Court of the United States for the Southern District of New York.

No. 1.

EMIL WERCKMEISTER, Plaintiff,
against
AMERICAN TOBACCO COMPANY, Defendant.

The amended complaint of the above-named plaintiff against the above-named defendant respectfully shows to this Court, upon information and belief:

First. That said plaintiff during the time hereinafter stated was and is a citizen of the German Empire, doing business at the City of Berlin, in Germany, under the trade name of "Photographische Gesellschaft," and at the City of New York in the United States under the name of "Berlin Photographic Company."

Second. That said defendant is a corporation duly incorporated under the laws of the State of New Jersey, and having a place of business in the Borough of Manhattan, in the County and State of New York, in the Southern District of New York.

Third. That shortly previous to the second day of April, 1894, one W. Dendy Sadler, a British subject, invented, designed and painted a certain painting called "Chorus," said painting showing a group of gentlemen sitting and standing around a punch bowl and holding pipes and filled glasses in their hands and singing in chorus, and said painting, by reason of its artistic grouping, its excellent drawing of the figures and faces, and its skillful execution, is a piece of art of very great merit and value.

Fourth. That the said W. Dendy Sadler on or about the second day of April, 1894, by an instrument in writing executed and delivered on the said day, and previous to any publication of said painting in any manner or form, assigned, transferred and sold to said plaintiff for a valuable consideration, all his right, title and interest in any copyright obtainable thereon in the United States of America, and in all other countries, and the sole liberty and right of printing and reprinting, publishing, completing, copying, finishing and vending said painting.

Fifth. That having acquired the right to obtain such copyright for said painting, and being a subject of the Emperor of Germany, and desiring to secure the copyright thereof under the laws of the United States of America respecting copyrights, and the sole right of printing and reprinting, publishing, completing, copying, executing, finishing and vending the same, said plaintiff before the publication thereof in this or any foreign country, to wit, on the sixteenth day of April, 1894, delivered to the Librarian of Congress at his office at Washington, District of Columbia, a description of said painting, to wit, "Chorus,"—W. Dendy Sadler, "A Company of Gentlemen with filled Glasses, singing in Chorus," and also a photograph thereof, and at the same time said plaintiff paid to the said Librarian of Congress the sum of one dollar ($1.00) for recording

said description and thereupon said Librarian of Congress duly received the same and recorded said description of said painting on the sixteenth day of April, 1894.

Sixth. That thereafter, on or about the first day of June, 1894, and not before, said plaintiff began the publication of said painting in this country and in foreign countries, by the sale of copies thereof.

Seventh. That by reason of the premises and the statutes in such cases made and provided there was secured to said plaintiff, his executors, administrators and assigns, or intended so to be, for the term of twenty-eight (28) years from said sixteenth day of April, 1894, the sole liberty of printing and reprinting, publishing,
7 completing, copying, executing, finishing and vending the said painting "Chorus."

Eighth. That said plaintiff has duly given notice of his copyright as is required by law, by inscribing upon a visible portion of every copy of said painting published by him, or of the substance on which the same were mounted, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus, "Copyright, 1894, by Photographische Gesellschaft."

Ninth. That at the time of the commencement of this action said defendant was and still is in possession, at its offices, No. 111 Fifth avenue, New York City, and at its factory building in said city, and in the hands of its various agents, officers and employees in said State of 7,338 sheets, each containing a copy of said copyrighted painting prepared in violation of plaintiff's copyright, wrongfully and without the consent of said plaintiff, the proprietor of said copyright first obtained in writing signed in the presence of two witnesses; that said defendant caused said copies to be printed for it by the American Lithographic Company and upon delivery thereof to defendant, published some of said sheets in the City of New York and elsewhere in the United States of America; that said unlawful printing and publication of said copies in defendant's possession was done before the commencement of this action, and within one year previous thereto, and during the existence of said copyright; and that 203 of said copies in the defendant's possession as aforesaid were, at the commencement of this action, seized by the Marshal of this Court under a writ of replevin duly issued out of this Court, and are
8 now in the hands of said Marshal or of the Clerk of this Court in pursuance to said writ duly executed.

That nine hundred and ninety-three (993) of said copies in defendant's possession at the place of business of the Deuther Manufacturing Company in the City of Buffalo, New York, were, after the commencement of this action, seized by the United States Marshal for the Western District of New York, under a writ of replevin duly issued out of this Court, and are now in the hands of said Marshal in pursuance to said writ duly executed.

Tenth. That by virtue of the statutes of the United States, every one of said copies of said painting found in the possession of said defendant as aforesaid, or which may hereafter be found in its posses-

sion, has become and will be forfeited to said plaintiff, and is, and they now are, his property.

Eleventh. That the same are wrongfully detained by said defendant.

Wherefore, said plaintiff demands judgment against said defendant for the delivery to him, said plaintiff, of all said copies of said painting, "Chorus," made in violation of said plaintiff's copyright thereon, and found in the possession of said defendant, and of all such further copies thereof made in violation of plaintiff's said copyright, as may be found in said defendant's possession previous to the trial of this action, together with the costs of this action.

BRIESEN & KNAUTH,
Plaintiff's Attorneys, 49 Wall Street, New York City.

9 SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss:

Antonio Knauth, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the foregoing amended complaint; that he has read said amended complaint and knows the contents thereof, and that the same is true except only the allegations therein stated to be on information and belief, and that as to those allegations he believes it to be true. Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not in this country, but is a resident of Berlin in the Empire of Germany, and not at present in this country and capable of making this affidavit; and that the sources of deponent's information, and the grounds of his belief concerning the matters stated to be alleged on information and belief in said amended complaint, are the possession of the certificate of the copyright referred to in said complaint issued by the Librarian of Congress, correspondence and personal interviews with the plaintiff, correspondence with the defendant and its attorney, and the personal examination of the defendant's infringing picture.

ANTONIO KNAUTH.

Sworn to before me this 21st day of December, 1903.

[SEAL.] OTTO v. SCHRENK,
Notary Public, N. Y. County.

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister Plaintiff, *vs.* American Tobacco Co., Defendant, No. 1.—Amended Complaint.—Briesen & Knauth,
10 Attorneys for Plaintiff, 49 Wall Street, Borough of Manhattan, New York.—Service of a copy of the within Amended Complaint is hereby admitted this 23rd day of December, 1903.—Wetmore & Jenner, Attorneys for Deft.

United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

The above-named defendant answers the amended complaint of the plaintiff and for answer says:

I. This defendant has no knowledge or information sufficient to form a belief as to any of the matters set forth in the amended complaint of the plaintiff, excepting that--

This defendant admits that it is a corporation duly incorporated under the laws of the State of New Jersey and that it has a place of business in the Borough of Manhattan, in the County and State of New York and Southern District of New York, and excepting that—

This defendant admits that on or about the 26th day of June the defendant had certain lithographed copies of a picture which
11 been made for the defendant by the American Lithographic Company, and which this defendant now understands and believes is claimed by the plaintiff herein to be an infringement of the alleged copyright mentioned in the amended complaint herein, but how many of such pictures were in the possession of the defendant or its employees this defendant has no knowledge or information sufficient to form a belief and therefore the defendant denies the allegations contained in the amended complaint in that behalf, excepting that—

This defendant is informed and believes that certain copies of the said picture were on or about the 26th day of June, 1902, and at the instance and by the procurement of the plaintiff, seized by the Marshal of this Court and were carried away by him, and that the number of copies of said picture so seized and carried away by said Marshal was one hundred and thirteen, and excepting that—

This defendant denies the allegations contained in the tenth and eleventh paragraphs of the amended complaint.

For a further and separate defense referring to the denials, admissions and allegations hereinbefore contained material to this separate defense, with the same force and effect as if the same were here at length repeated, this defendant alleges—

II. Upon information and belief that if any such copyright was obtained by the plaintiff as is set forth in the amended complaint herein, which, however, the defendant does not admit, but denies as aforesaid, the same was and is void for the reason that the plaintiff, at the time of taking out the said copyright, was not and never had or has been either the author, inventor, designer or proprietor of the said painting "Chorus" alleged in the amended com-
12 plaint herein to have been copyrighted, nor the assignee of the author, inventor, designer or proprietor thereof and had no right or authority under the statute relating to copyrights to take out or obtain any copyright thereon.

For a further and separate defense to the cause of action set forth

in the amended complaint, this defendant, referring to the denials, admissions and allegations hereinbefore contained material to this separate defense, with the same force and effect as if the same were here at length repeated, alleges, upon information and belief as follows:

III. That if any such copyright was obtained by the plaintiff as is set forth in the amended complaint herein, which, however, this defendant does not admit but denies as aforesaid, the same was and is void and was abandoned to the public and the plaintiff had and has no right to maintain any action thereon for the reason that the said painting "Chorus" alleged in the amended complaint to have been copyrighted was publicly exhibited by the author and proprietor thereof at the exhibition of the Royal Academy of Arts held in the City of London, England, from the first Monday of May in the year 1894, to the first Monday of August in the same year, both days inclusive, and continuously during said period, and was during the whole of said period exhibited to the public and published and that there was not at any time during the said exhibition, nor before, nor at any time since, any notice of the said copyright inscribed upon some visible portion of the said painting or on the substance on which the same was mounted, as required by the statute in such case made and provided, and that such exhibition and publication was with the knowledge, consent and permission of the plaintiff and the said Sadler, the author and proprietor of said painting.

13 Wherefore, the defendant demands judgment that the amended complaint be dismissed with costs, that the plaintiff be required to return the copies of said picture so seized by the Marshal of this Court, or the value thereof, and that the defendant have judgment against the plaintiff by reason of the damages caused by the taking and detention thereof.

WETMORE & JENNER,
Defendant's Attorneys.

34 Pine Street, Borough of Manhattan, N. Y. City.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Percival S. Hill, being duly sworn, deposes and says:

That the foregoing answer is true of my own knowledge excepting the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true. That the reason why this verification is not made by the defendant is that the defendant is a corporation, that I am the 1st Vice-President thereof, that my information has been derived from employees of the defendant and from officers and employees of the American Lithographic Company having knowledge or information on the matters set forth in the answer, and the statements made to me by such persons are the grounds of my belief.

PERCIVAL S. HILL.

Sworn to and subscribed before me this 22nd day of July, 1903.

[SEAL.] JOHN J. O'KEEFE,
Notary Public in and for the County of New York.

14 Circuit Court of the United States for the Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

The above-named plaintiff, replying to the further and separate defense set out in paragraphs marked "II" and "III" in the answer to the amended complaint herein respectfully shows to the Court, upon information and belief:

First. He denies each and every allegation contained in said paragraph marked "II" of said answer.

Second. He denies each and every allegation contained in said paragraph marked "III" of said answer.

BRIESEN & KNAUTH,
Attorneys for Plaintiff.

49 Wall Street, New York City.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Antonio Knauth, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff herein and acquainted
15 with the facts herein and has personal charge of the action herein; that he has read the foregoing reply and knows the contents thereof, and that the same is true to his own knowledge, except as to those allegations therein stated to be alleged upon information and belief, and that as to those allegations he believes it to be true. Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not in this country but is a resident of Berlin, Germany, and not at present in this country and capable of making this affidavit; that the sources of deponent's information and the ground of his belief concerning the matters stated to be alleged on information and belief in said reply are the possession of all the original papers in the action, correspondence and interviews with the plaintiff and plaintiff's representatives and with the defendant and defendant's attorney.

ANTONIO KNAUTH.

Sworn to before me this first day of October, 1902.

EUGENE EBLE,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister *vs.* American Tobacco Company.—Reply.—Briesen & Knauth, Attorneys for Plaintiff, 49 Wall Street, Borough of Manhattan, New York.—Service of a copy of the within Reply is hereby admitted this first day of October, 1902. Wetmore & Jenner, Attorneys for Defendant.

16 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Tuesday the 22nd day of November, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable William K. Townsend, Circuit Judge.

EMIL WERCKMEISTER
vs.
AMERICAN TOBACCO COMPANY.

Now comes the plaintiff by Antonio Knauth, Esq., his attorney, and moves the trial of this cause. Likewise comes the defendant by William A. Jenner, Esq., its attorney. Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the plaintiff and the argument of counsel the jury, by direction of the Court find a verdict in favor of the plaintiff.

Thereupon Mr. Jenner moves to set the verdict aside and for a new trial. Denied.

Stay of 60 days after entry of judgment within which to make and serve a case with leave to turn the same into a Bill of Exceptions, granted to defendant. Thereupon, on Friday, November
17 25th, 1904, Mr. Jenner, defendant's counsel, moves for a new trial and to set the verdict aside. Denied.

An Extract from the Minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

The issues in this action having been brought on for trial before the Hon. William K. Townsend, United States Circuit Judge, and a jury at a Stated Term of this Court, held in the Court Rooms thereof, in the Post Office Building, in the City of New York, Borough of Manhattan, on the 22nd day of November, 1904, and the issues having been tried, and a verdict directed by the Court in favor of the plaintiff, now, therefore, and on motion of Briesen & Knauth, the attorneys for the plaintiff, it is—

Adjudged that the plaintiff have and retain, and is entitled to the possession of One thousand one hundred ninety-six (1,196) sheets, each containing a copy of the plaintiff's copyrighted picture "Chorus," found in the possession of the defendant and re-
18 plevined by the United States Marshal, all as alleged in plaintiff's complaint, said sheets having been made in violation of plaintiff's copyright, and that the same are forfeited to the plaintiff

and are of the value of One thousand and ten dollars ($1,010), and it is further—

Adjudged that the plaintiff recover from the defendant the sum of Eighty-nine 30/100 ($89.30) dollars, his costs and disbursements as taxed, and that the plaintiff have execution therefor.

Dated New York, December 5, 1904.

JOHN A. SHIELDS, *Clerk.*

Approved as to form.

WETMORE & JENNER,
Attorneys for Defendants.

(Endorsed:) United States Circuit Court, Southern District of New York.—At Law.—Emil Werckmeister *vs.* American Tobacco Co.—Judgment.—Briesen & Knauth, Attorneys for Plaintiff, 49 Wall Street, Borough of Manhattan, New York.—U. S. Circuit Court, Southern District of New York.—Filed Dec. 5, 1904. John A. Shields, Clerk.

19 United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

Please take notice that the within is a copy of the Bill of Exceptions proposed on behalf of the defendant herein.

Dated February 11, 1905.

WETMORE & JENNER,
Attorneys for Defendant.

34 Pine Street, New York, N. Y.

To Messrs. Briesen & Knauth, Attorneys for Plaintiff.

20 Circuit Court of the United States, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

Bill of Exceptions.

At a term of the Circuit Court of the United States in and for the Southern District of New York, held at the Court Room, in the Post Office Building, in the City of New York, before the Hon. William K. Townsend, Circuit Judge, on the 22nd day of November, 1904, the issues joined by the parties herein upon the pleadings came on to be tried before the Court and a jury, for that purpose duly empaneled, at which day came there as well said Emil Werckmeister, plaintiff, by

Antonio Knauth and Otto von Schrenk, his counsel, and the said American Tobacco Company by William A. Jenner and Oscar W. Jeffery, its counsel, and the jurors for that purpose duly empaneled to try the said issues, being called, also came then, and were then and there in due manner chosen and sworn to try the said issues, and then and thereupon the trial proceeded as follows:

A jury was empaneled and sworn.

Opening for Plaintiff.

Mr. KNAUTH: May it please the Court and gentlemen of the jury, this action is an action in the nature of a replevin and is main-
21 tained under Section 4965 of the Revised Statutes of the United States.

That is the statute under which this action is brought, which, as I said before, is in the nature of a replevin action brought within the provisions of the Code of Civil Procedure of the State. Now the complaint in the case sets forth that the plaintiff is and was a citizen of the German Empire, doing business at the City of Berlin, Germany, under the name of Photographische Gesellschaft, which means Photographic Company, and at the City of New York in the United States under the name of the Berlin Photographic Company; that the defendant is a corporation duly incorporated under the laws of the State of New Jersey, and having a place of business in the Borough of Manhattan, in the County and State of New York, in the Southern District of New York, and that is admitted by the defendant.

The painting in question is a painting produced by an English artist, W. Denby Sadler, who sold the copyright of the painting to the plaintiff in or about April, 1894, signing a written assignment of the copyright to the plaintiff. He did not sell to the plaintiff the picture, but the picture was loaned by him to the plaintiff for the purpose of procuring a copy, which the plaintiff did by a photogravure process, and kept it in his possession, and finally returned the painting to the artist. Having obtained an assignment of the copyright at common law, the plaintiff thereupon registered his copyright in the United States Patent Office, and we shall produce to your Honor and to the jury the certificates of the Librarian of Congress as to the registration of a description of the painting and of the payment of the fee, and thereafter the filing of a photograph of
22 the painting in exact accordance with the statute as prescribed therein. Now that is the nature of the right under which the plaintiff claims in this action the forfeiture of certain copies. Thereafter the complaint proceeds by stating that the plaintiff having acquired this copyright, the defendant, without the permission of the plaintiff, as stated in the statute, has published the copies of this work in question and that at the time of the commencement of this action the defendant had in its possession in the City of New York two hundred and three copies of this painting made by a chromo lithographic process, which it intended to use as an advertisement, and that under a writ issued by this Court, in the nature of

a writ of replevin, the Marshal seized these 203 copies at the office of the defendant company in this city. In addition to that the complaint alleges that 993 further copies of this work were found in the hands of the Deuther Manufacturing Company in the City of Buffalo, and were likewise seized by the Marshal under a writ of replevin and are now in the hands of the Marshal.

In view of these facts the complaint then prays that these copies so found by the Marshal be declared forfeited to the plaintiff under the statute. That is the end of the complaint.

Mr. JENNER: Now, may it please the Court, on the complaint and on the plaintiff's opening I move to dismiss the complaint on these grounds: It appears that the right to forfeiture which is alleged in the complaint and which has been mentioned in the opening is an alleged right which depends solely upon the copyright taken out by the plaintiff Werckmeister, and that alleged copyright depends upon a license given by the artist of the painting to the plaintiff to take out general copyright. The statute of the United States, as I understand it, does not authorize a copyright to be taken out by any
23 person who has that quality only. The statute provides in Section 4952, as amended March 3, 1891: "The author," the artist I will say, "inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negatives thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as work of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same."

Does the statute mean the assign simply of the mere right to take a copyright which the author, inventor, designer or proprietor has, or does it mean the assign of the whole property in the thing? In that connection your Honor must read and construe "the executors, administrators or assigns," that the assign has "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same;" that is the copyrightable thing, and the assigns of an artist who has painted a copyrightable painting must be the person under this statute who has acquired, by virtue of the copyright, the sole right of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same, and if the assign has not got all of those rights he is not an assign under that statute. To construe it in any other way will necessarily lead to the utmost confusion in the construction of rights under that section and under the copyright law in general. And that right is exclusive, and if the assign in this case was not an assign who took all of those rights of printing, reprinting, publishing,
copying, executing, finishing and vending, he is not the as-
24 sign contemplated by this statute. But we are informed in the opening that the picture was loaned to the plaintiff, Werckmeister, and after a plate was made from it it was returned by Werckmeister to the artist. We are informed by the complaint and the opening that the picture was not sold. The property in that

picture remained in the artist and he retained the right of printing, and of publishing, publishing the painting, and the right of completing if it was unfinished, and of vending.

Here the only right which Werckmeister has is founded upon the statute, and unless Werckmeister is the person who is defined by the statute he had no right to take out a copyright, and unless under the instrument which gave him any scintilla of right he got all the rights which the statute gives to an assign, he could not be the person contemplated by this act. If Werckmeister is the assign, then he got the right to publish, to complete and to sell. He disclaims it. As a matter of fact he has not got it. The common law definition of the character in which Werckmeister sues is that of a licensee. If you seek for a single word which shall be descriptive of the rights which he got, does not the word licensee fully and comprehensively describe it, a license to take out a copyright. Up to the taking of a copyright there is only one common law right in existence, and that is the right which an owner of property has to do what he chooses with his property. He may destroy, or sell, or finish, or change it, or any thing else with it that he chooses. When the owner, whether he be the original owner as the artist, or the author, or the proprietor, where he has bought the thing, or where he has had the thing made for him by persons in his employ, as a dictionary or a directory maker, has got that thing, he has complete ownership and may do anything he chooses with it. If the law gives him a right to copyright it he may do that so as to protect him in his right to make copies, and when he does take a copyright then there is another thing which, by operation of the statute, has come into existence. Not that he may sell, for that is a statutory right, and is a piece of property which of course will be recognized by the courts, but that right does not come into existence until somebody authorized by the act of Congress to acquire that right and secure it has complied with the law in that regard. That is in substance the point which I wish to make here, and I deem it proper to make it at the threshold and in this manner and time. It is a new question. It has not been decided in any of the Federal courts, which, of course, alone could decide it. So far as the question has been touched on in somewhat analogous cases in State courts, I know of nothing which impairs the validity of my argument, and I submit it to your Honor.

The COURT: This is a new question, as Mr. Jenner said; it is a very important question. I want to dispose of this case at this time so that this question may properly go to the Court of Appeals. I am not sure in my own mind that Mr. Jenner's contention is not right. I am not sure but what you are right, and I take it the best way to dispose of this case so the questions may go fairly to the Court of Appeals, I shall rule against you *pro forma* on that without any expression of opinion, for it is certainly a very pretty and a very close question. I deny your motion and the exception is to be noted.

Defendant excepts. Allowed.

Mr. KNAUTH: I will now offer in evidence the deposition of the plaintiff, Werckmeister, taken under a commission executed in this case.

26 EMIL WERCKMEISTER, resident at No. 1 An der Stechbahn, Berlin, Germany, by occupation an art publisher, aged fifty-eight years and upwards, being duly and publicly affirmed, pursuant to the directions hereto annexed and examined on the part of the plaintiff, doth depose and says as follows:

"Q. 1. State your name, age, residence and occupation?

"A. My name is Emil Werckmeister. I am fifty-eight years of age. My address is No. 1 An der Stechbahn, Berlin, Germany. I am a fine arts publisher.

"Q. 2. Of which country are you a citizen or subject, and how long have you been such citizen or subject?

"A. I am a citizen of Germany born in Germany of German parents, and have lived here all my life.

"Q. 3. If you are doing business under any firm name, state what is your firm name and where you are doing business under said firm name and how long you have used said firm name?

"A. The firm name of my business is Photographische Gesellschaft, Berlin (Germany). This name has been used since 1862, and our business location is No. 1 An der Stechbahn.

"Q. 4. Are you the person who caused to be delivered to the Librarian of Congress at his office at Washington, District of Columbia, a description of a painting painted by one W. Dendy Sadler, in the following words: 'Chorus'—W. Dendy Sadler, 'A company of gentlemen with filled glasses singing in Chorus' and also a photograph thereof?

"A. Yes, I am the same person. I caused to be mailed to the Librarian of Congress at Washington the description and a photograph of a painting entitled 'Chorus,' by W. Dendy Sadler.

"Q. 5. Had you in the month of February, 1894, any conversation or conversations with said W. Dendy Sadler, relating to
27 said painting and the copyright thereof, and if so, state what conversation or conversations you had and where?

"A. I called on W. Dendy Sadler, at his studio in Finchley Road, London, in February, 1894, and saw his picture 'Chorus' very nearly finished. I asked whether I might buy the copyright of this picture. He answered in the affirmative and asked two hundred pounds sterling for the copyright. I consented to this price and thereupon the purchase was agreed upon orally between me and W. Dendy Sadler.

"Q. 6. If you have stated in answer to the last interrogatory that you agreed orally to purchase the copyright of said painting, state what, if anything, was agreed with reference to the painting itself and whether you paid said W. Dendy Sadler any money, and if so, when and where?

"A. With reference to the painting itself, it was agreed orally that it should be sent to the Photographische Gesellschaft, Berlin, Germany, as soon as possible. The price agreed upon for the copyright was paid to W. Dendy Sadler, in London, through Mr. A. Levi, the manager of the London Agency, on April 11, 1894, in our check for £200 on the Union Bank, in London, which check had been sent to Mr. Levi for this purpose by my firm in Berlin on April 9, 1894."

"Q. 7. If you have stated that you purchased the copyright of said painting from said W. Dendy Sadler, state whether you had reference to any particular country or to any and all countries with reference to copyright protection therefor."

Objected to by defendant. Overruled. Excepted.

"A. The copyright has been sold to me or to my firm, for all countries without any exception. I would never buy a copy-
28 right with reference only to some particular country, for my firm does business in all civilized countries and has its own agencies in London, New York and Paris. A limited copyright would be of no value for me or for my firm.

"Q. 8. State whether you received said painting thereafter and what you did with it?

"A. The Photographische Gesellschaft received the said painting in Berlin, March 8, 1894. We made reproductions of it and returned it to W. Dendy Sadler on March 22d, 1894.

"Q. 9. If you have stated that you caused any copy or copies to be prepared of said painting, either with or without colors, please produce a copy of the same in convenient form and attach it to your deposition and state whether it is a correct copy of the original and by what process it has been made?

A. I produce herewith a correct copy of the original made by the process of photogravure. In order to put it into a convenient form so that it can be attached to my deposition, it is cut into eight pieces and mounted on calico. I hereby sign this copy for identification and ask that it be attached to my deposition marked Exhibit A."

Plaintiff's counsel offered in evidence Exhibit A. Same received and marked Plaintiff's Exhibit A.

"Q. 10. Do you know the handwriting of said W. Dendy Sadler?

"A. I know W. Dendy Sadler's handwriting, thoroughly, for I saw very often his written answers, when on the occasions of my visits in London, our London manager had asked W. Dendy Sadler for an appointment.

"Q. 11. State whether you received from said W. Dendy Sadler any instrument in writing relating to said painting or the copyright thereof?

"A. In acknowledgment of the oral sale of the copyright
29 of said painting in February, 1894, W. Dendy Sadler signed an instrument in writing, dated April 2, 1894, relating to the copyright of said painting, and handed it to our London agency, which transmitted it to my Berlin firm.

"Q. 12. If you answer the two last interrogatories in the affirmative, please produce the paper referred to in your answer to interrogatory eleven, and state whether or not the signature under the same is in the handwriting of said W. Dendy Sadler.

"The Commissioner is requested to mark the paper produced by the witness for identification and to annex hereto a copy of the same and to certify on said copy that the same is a true copy of the original produced by the witness.

"A. I produce the instrument referred to in my answer to interrogatory eleven which is bound into a volume of the permanent records of our office, and I state that the signature under the name is in the handwriting of said W. Dendy Sadler."

Mr. KNAUTH: There is attached to it a certificate:

"(I, Frank H. Mason, Commissioner, certify that I have examined the original instrument signed by W. Dendy Sadler, at London, April 2, 1894, transferring to the Photographische Gesellschaft of Berlin, the copyright of his picture 'Chorus.' This I have compared carefully with the certified copy made and certified by me as such on the 6th day of July, 1901, which said copy is attached to this commission, I hereupon mark it for identification Exhibit B, and sign the same with my signature.)"

By stipulation the copy was received in evidence in place of the original.

The paper attached by the witness to his deposition reads as follows:

30 *"Photographische Gesellschaft, Berlin, Kunst-Verlag.*

"I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200. London, April 2, 1894.

"(Signed) W. DENDY SADLER."

And attached to it is the certificate of the U. S. Consul General at Berlin.

"At the execution of a commission for the examination of witnesses between Emil Werckmeister, of Berlin, Plaintiff, and the American Lithographic Co. of N. Y., Defendant, this Exhibit marked B and hereto annexed was produced and shown to the witness Emil Werckmeister and by him deposed unto and subscribed by him at the time of his examination before.

[SEAL.] FRANK H. MASON, *Commissioner.*"

Said Exhibit B attached to this Commission, was offered in evidence, received and marked Plaintiff's Exhibit B.

"Q. 13. If you have stated that you have caused copies of said painting to be prepared at your establishment in Berlin, state when you first put said copies on the market, and what was done by you with reference to marking thereon any notice required by the Copyright Statute of the United States?

"A. We first put copies of the said painting made by the photogravure process on the market in the fall season of 1894. The copyright notice required by the copyright statute of the United States was engraved in the copper-plate, as shown by the copy at-
31 tached to his deposition and marked Exhibit A, in the words 'Copyright, 1894, by Photographische Gesellschaft' on the left upper margin of the photogravure."

Plaintiff's counsel calls the attention of the jury to the notice which is printed on this picture which the plaintiff produces.

"Q. 14. State what you have done with reference to such marking thereafter in the sale of any copies of said painting sold by you?

"A. Later on, we put on the market also photographs of said painting, and this same copyright notice is printed either on the mount of the photographs or stamped into the surface of the copy. The head officials of my shipping department control such marking, so that no copy can be shipped without said copyright notice."

Defendant's counsel reads the cross-examination as follows:

Cross-examination:

"A. I did business during the whole of the year 1894 in the United States of America. The address of my agency in New York was No. 14 East Twenty-third street, and it was conducted under the name of the Berlin Photographic Company.

"X Q. 5. If you answer the fourth direct-interrogatory affirmatively, state fully how and in what manner you caused to be delivered to the Librarian of Congress the description referred to in said 4th direct interrogatory.

"A. I caused to be delivered to the Librarian of Congress the description referred to in the fourth direct-interrogatory (and of which I produce a correct copy to be attached to my deposition and marked Exhibit C) in the following manner: I mailed the description, together with a photograph of the painting, on March 31, 1894, to my New York agency, in order to be deposited in the mail
32 within the United States, addressed to the Librarian of Congress at Washington, District of Columbia.

"X Q. 6. If you answer the 5th direct-interrogatory, state what you said, and what W. Dendy Sadler said in the course of such conversations.

"A. I have nothing to add to my answer to the fifth direct-interrogatory.

"X Q. 7. If you answer the 6th direct-interrogatory, state everything that was said by you and by W. Dendy Sadler in respect to the matter inquired about, and if any part of the arrangement was in writing, produce the writing to be annexed to your deposition as a part thereof.

"A. I have nothing to add to my answer to the sixth direct-interrogatory in reference to what was said by myself and by W. Dendy Sadler; no part of the arrangement was in writing.

"X Q. 9. If you answer the 11th direct-interrogatory state all that you did with reference to marking on the copies therein mentioned any notice of copyright.

"A. I stated what I did with reference to marking on the copies of said painting the notice required by the Copyright Statute of the United States in my answer to the 13th and 14th direct-interrogatories.

"X Q. 10. If you answer the 12th direct-interrogatory, state all

that you did with reference to marking on the copies therein mentioned any notice of copyright?

"A. The twelfth direct-interrogatory relates exclusively to the contract of sale between W. Dendy Sadler and the Photographische Gesellschaft of Berlin.

"X Q. 12. Produce, to be annexed to your deposition, a copy of all newspapers, journals, periodicals, pamphlets and other publication containing a copy or reproduction of said painting, 'Chorus,' and in which the same was inserted with your knowledge
33 or consent or the knowledge or consent of your firm?

"A. I have no copies of newspapers, journals, periodicals, pamphlets or other publications containing a copy or reproduction of said painting 'Chorus,' and in which the same was inserted with my knowledge or consent or the knowledge or consent of my firm. Whenever such a consent was granted, it was granted under the condition that under every copy should be printed 'Copyright 1894 by Photographische Gesellschaft.' This is shown by the words 'Copyright 1894 by Photographische Gesellschaft' in the illustrated catalogue of the Exhibition of the Royal Academy at Burlington House, Piccadilly, London, which catalogue was published under the title of 'Academy Notes,' in May, 1894, and in which, on page 128, a reproduction of said painting 'Chorus' was inserted in order to advertise the forthcoming publication of our photogravure. I hand this illustrated catalogue to the Commissioner to be attached to this my deposition and marked Exhibit E."

I offer in evidence Exhibit C, which the palintiff mentioned in his cross-examination read by the defendant's counsel, a letter addressed to the Librarian of Congress at Washington, D. C., under date of March 31, 1894. It says:

"Photographische Gesellschaft, Berlin.

"BERLIN, *March 31st*, 1894.

"To the Librarian of Congress, Washington, D. C.

"SIR: Please find enclosed Doll. 1.50 for record fee and certificate of copyright for a painting
"by W. Dendy Sadler,
"entitled—'Chorus.'
of which we are the proprietors of the copyright and of which the following is a description:
34 "A company of gentlemen with filled glasses singing in chorus.

"We also enclose a photograph of the painting as required by law and request that the certificate of copyright be sent to the care of the Berlin Photographic Company, 14 East Twenty-third Street, New York City.

"Very respectfully,
"PHOTOGRAPHISCHE GESELLSCHAFT."

"EMIL WERCKMEISTER."

Defendant's counsel objected to the paper on the ground that it is incompetent as evidence; the fact that the law had been complied with is to be proved otherwise than by letter which the plaintiff under his firm name sends to the Librarian of Congress, and I think that the letter which the plaintiff sends to the Librarian of Congress is not competent evidence that any condition of the statute was complied with. I therefore think the letter is incompetent in evidence.

Plaintiff's counsel says he will hereafter show by another witness that the letter was mailed to the Librarian of Congress in accordance with the statement made in answer to this question.

The COURT: It will be admitted now with the right to move to strike out generally.

Defendant's counsel excepted. Allowed.

Letter marked Plaintiff's Exhibit C.

Plaintiff's counsel reads the redirect-examination as follows:

"Redirect examination:

"R. D. Q. 1. If you have not yet stated where you published and sold the first copies of the picture 'Chorus,' please state so now?

"A. Samples of the reproductions of the said painting 'Chorus' were given to all our travelers and agents for the fall season of 1894, and it would be difficult to state where the first copies were sold.

"R. D. Q. 2. Who was the manager of your business in the United States of America during the year 1894?

"A. The manager of my business in the United States during the year 1894 was L. H. Schuetze of 14 East Twenty-third street, New York.

"WITNESS (continued): In using my firm name Photographische Gesellschaft in my correspondence, it is my habit to refer to my establishment in the plural. I use the term 'we' when speaking of my house."

Examination taken, reduced to writing, and by the witness subscribed and affirmed to this 6th day of March, in the year 1903, before—

(Signed) FRANK H. MASON,
[SEAL.] *U. S. Consul General, Commissioner.*

Plaintiff's counsel read in evidence the deposition of W. Dendy Sadler, given under a commission issued in this case to the United States Consul at London, England.

"WALTER DENDY SADLER, of Hemingford Grey, St. Ives, in the County of Huntington, England, an artist, being duly sworn and examined on behalf of the complainant and plaintiff in the above-entitled causes, respectively, testified as follows:

"Q. 1. What is your name, age, residence and occupation?

"A. My name is Walter Dendy Sadler, my age is 48 years and upwards; I reside at Hemingford Grey, St. Ives, in the County of Huntington, England, and my profession is that of an artist.

36 "Q. 2. Of which country are you a citizen or subject, and how long have you been such citizen or subject?

"A. I am a subject of Great Britain and I have been so all my life.

"Q. 3. Are you the person who designed and painted a certain oil painting called 'Chorus,' a copy of which, reproduced on a small scale by photogravure process, is hereto attached marked 'Exhibit A'?

"A. I am.

"Q. 4. Please state when you designed and painted said painting?

"A. During the years 1893 and 1894.

"Q. 5. State whether you ever had any transaction with Emil Werckmeister, of Berlin, Germany, with reference to said painting, or the copyright thereof, and if so, what was agreed upon between you and him and when and where?

"A. Yes. I agreed in January, 1894, to sell to the said Emil Werckmeister, of Berlin, Germany, the copyright of the said painting 'Chorus,' designed and painted by me for the sum of £200, the painting to be sent to him at Berlin to be photogravured and returned to me in time for me to exhibit it at the annual exhibition of the Royal Academy in 1894. The transaction took place in my studio, 44 Finchley Road, in the County of London, England.

"Q. 6. State whether said agreement was made orally or in writing?

"A. The said agreement was, in the first place, made verbally and confirmed afterwards in writing.

"Q. 7. What, if anything was agreed with reference to the possession of the painting?

"A. No agreement was necessary with reference to the painting as the transaction with the said Emil Werckmeister was solely an agreement for the sale of the copyright; he only had the loan of the painting for the purpose of its being photogravured with the understanding, as I have before testified, that he was to return it
37 to me in time for its exhibition at the forthcoming annual exhibition at the Royal Academy in 1894, which he did.

"Q. 8. State whether any money was paid to you by said Emil Werckmeister and whether you delivered or caused the painting to be delivered to him and for what purpose?

"A. The said Emil Werckmeister paid me £200 for the copyright of the said painting and I caused the said painting to be delivered to him in London for the purpose of its being photogravured, and he returned it to me in accordance with his agreement, in time for its exhibition by me at the annual exhibition of the Royal Academy in 1894.

"Q. 9. If you have stated that you sold to said Emil Werckmeister the copyright for said painting, did you have reference to any specific country and copyright protection therein, or to any and all countries where such protection might be afforded?

"A. No; at the time I sold the said copyright to the said Emil Werckmeister, I did not have reference to any specific country and copyright protection therein. I sold him the copyright outright and

left him to do whatever he liked to protect himself by registering the copyright in this and other countries.

"Q. 10. State whether you executed and delivered to said Emil Werckmeister on or about April 2d, 1894, a written paper of assignment in the following language: 'I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200. London, April 2, 1894. W. Dendy Sadler.'

"A. Yes, I did.

"Q. 11. State whether or not previously to said April 2, 1894, said painting had ever been published by you, and if so, how, when and where?

"A. No; previously to said April 2d, 1894, said painting had never been published by me or any one else."

Defendant's counsel reads the cross-examination as follows:

38 "Cross-examination:

"X Q. 1. If you answer the third or fourth direct interrogatories or either of them, state whether said picture called 'Chorus' was a painting in oil upon canvas or upon wood, and about what were the dimensions thereof?

"A. It was a painting in oil, on canvas, and its size was 50 inches by 38 inches.

"X Q. 2. If in answer to the fifth or sixth direct interrogatories you say you had a transaction with Emil Werckmeister, of Berlin, Germany, with reference to said painting, and that said transaction was oral, state with what person you had such transaction, giving the name and residence of such person, and state all that he said, and all that you said, and if you state that such transaction, or any part thereof, was in writing, produce any and all writings composing the same, to be annexed to your deposition as a part thereof?

"A. My transaction was with Emil Werckmeister of Berlin, Germany, himself, and the said transaction was oral. He asked me the price of the copyright. I told him £200, at which he kicked. I stuck out and he agreed to pay that sum. The picture was in an unfinished state at the time I was negotiating with him for the sale of the copyright. I agreed to have it finished by the 1st of March, 1894, in order that he might send it over to Berlin to be photogravured, he undertaking that he would return me the painting in time to send it in to the annual exhibition at the Royal Academy in 1894. This was afterwards reduced to writing in the form of a letter written to me by Mr. Arthur Levy, the manager of the Berlin Photographic Company, dated from No. 133 New Bond Street, London, England, and signed by the said Arthur Levy. I had not seen the said Arthur Levy before in connection with this transaction. I have not
39 kept the said letter or a copy thereof, as my interest in the picture and the copyright ceased so long ago. I, therefore, cannot produce either the original or a copy thereof for the purpose of being annexed to my deposition.

"X Q. 4. State whether the said picture 'Chorus,' was exhibited at

the exhibition of the Royal Academy of Arts, held in London, England, in the year 1894, and if it was exhibited, will you state how long it remained on exhibition?

"A. Yes, the said picture 'Chorus' was exhibited at the exhibition of the Royal Academy of Arts held in London, England, in the year 1894, and it remained on exhibition for about three months.

"X Q. 5. Was said picture 'Chorus,' during the time of said exhibition framed, and when so framed, was it hung in one of the galleries of the exhibition, so that visitors to the exhibition could see the same?

"—. I answer the whole of this cross-interrogatory in the affirmative.

"X Q. 6. While the said picture was exhibited at said Royal Academy Exhibition, was there inscribed upon some visible portion thereof, or on the substance upon which the said picture was mounted or on the frame thereof, the following words, viz., 'Copyright, 1894, by W. Dendy Sadler,' or any words of like import, or importing that a copyright had been taken either by you or by any one else, in the year 1894, or in any other year?

"A. I answer the whole of the matters propounded to me in this cross-interrogatory in the negative.

"X Q. 7. Who was the owner of said painting 'Chorus' at the time of the exhibition thereof at said Royal Academy exhibition?

"A. I was the owner.

"X Q. 8. Were not you the owner of said painting 'Chorus' during the period of said exhibition?

"A. Yes, I was.

40 "X Q. 9. During the said exhibition was there at any time any notice of any copyright thereof inscribed upon some visible portion thereof, or on the substance on which the same was mounted, or on the frame thereof? If you answer affirmatively, will you state the words and figures of such notice and on what visible portion thereof such words were inscribed?

"A. During the said exhibition there was not at any time any notice of any copyright thereof inscribed upon some visible portion thereof, or on the frame thereof.

"X Q. 10. Is the paper writing hereto annexed, bearing date January 23, 1902, and purporting to be signed W. Dendy Sadler, in your handwriting?

"A. I have examined the paper writing hereto annexed, bearing date January 23, 1902, and I say it is in my handwriting and it is signed by me."

The letter referred to in the witness' answer is as follows:

"HEMINGFORD GREY,
"SAINT IVES, HUNTS, *Jan'y* 23, '02.

"DEAR SIR: My picture 'Chorus' is in the possession of Vincent Cotterell, Esqr., 76 Grosvenor Street, W. It has only been exhibited once, to my knowledge, & that was at the Royal Academy.

"Believe me,

"Yours truly, W. DENDY SADLER."

"X Q. 11. Is the picture 'Chorus' referred to in said paper writing, dated January 23, 1902, the same picture as that to which you *shall* have referred in your answers to the 3d, 4th, 5th, 6th, 7th, 8th, 9th and 10th direct interrogatories?

"A. Yes; it is.

41 "X Q. 12. Did you sell or otherwise part with the ownership and possession of said picture or painting 'Chorus,' and, if you did, please answer when you sold or parted with the ownership and possession of it, and to whom you sold or transferred it?

"A. Yes; I sold the said picture or painting 'Chorus' and parted with the possession of it in October, 1899, to Mr. Vincent Cotterell, of 76 Grosvenor street, in the County of London, England.

"X Q. 13. Your attention is further directed to a certain other paper writing hereto annexed, bearing date April 11, 1902, and purporting to be signed Bertha Sadler. Please examine same and state whether said paper writing is in the handwriting of any member of your family, and whether the same was written by your direction, procurement or suggestion?

"A. I have examined the paper writing hereto annexed bearing date April 11, 1902, and I say the same was written by my directions by my daughter, Bertha Sadler, and the whole of it, including the signature, is in her handwriting."

The second letter is as follows:

"HEMINGFORD GREY,
"SAINT IVES, HUNTS, *April* 11, 1902.

"DEAR SIR: My father wishes me to write to you in answer to your question whether the copyright notice was attached to his picture 'Chorus' when it was exhibited at the Royal Academy, & to say it was not.

"I am, yours truly, BERTHA SADLER."

"X Q. 14. Was it not the fact that when your said picture

42 'Chorus' was exhibited in the Royal Academy in the year 1894, no copyright notice was attached to or inscribed upon any visible portion of the said picture, or on the substance on which the same was mounted?"

"A. I answer the whole of the matters propounded to me in this cross-interrogatory in the affirmative; that is to say, no notice was attached thereto.

"X Q. 15. Was it not the fact that said painting 'Chorus' was for sale at the time of said Royal Academy exhibition in 1894?

"A. Yes, it was the fact that said painting 'Chorus' was for sale at the time of said Royal Academy exhibition in 1894, but with the copyright reserved.

"X Q. 16. Please state, according to the best of your knowledge, remembrance and belief, the present whereabouts of said picture 'Chorus?'

"A. The picture 'Chorus' is, so far as I know, at the present time hanging in the dining-room of the said Mr. Vincent Cotterell, at

No. 76 Grosvenor street, in the County of London, England. The last time I saw it hanging there was in January last."

Plaintiff's counsel reads the redirect-examination of Sadler Question 1, subject to the objection made that the whole matter is immaterial, irrelevant and incompetent.

Defendant's counsel objects to the evidence, and in order to save the defendant's rights and to save the time of the Court and jury, I desire to have it understood, if the other side will agree, that the defendant objects to the reading of each one of the redirect questions on the ground that they are incompetent, irrelevant and immaterial, that the fact that the painting was not inscribed with the statutory notice is the important fact, and that the reason
43 why it was not inscribed is entirely immaterial, and that no custom, no privilege of copying there can affect the question at all.

The COURT: Then you, Mr. Jenner, are entitled to your objection, and the noting of the exception to my ruling, to overruling your objection on all the redirect-examination on each and every one of the questions.

Mr. KNAUTH: The redirect-examination was as follows:

"Redirect examination:

"R. D. Q. 1. Did you give or send to the Royal Academy any instructions concerning the care of or disposition over the picture 'Chorus' at the time when you caused it to be exhibited at the exhibition of 1894 mentioned by you in your cross-examination?"

The COURT: State to the jury this picture was exhibited in the Royal Academy under restriction as to its exhibition there.

Plaintiff's counsel says the deposition states that the Royal Academy in London had a rule forbidding the copying of any pictures in the Royal Academy, and that rule was enforced in 1894 while the picture of Mr. Sadler was exhibited; that is the substance of it. The answer to R. D. Q. 1 is as follows:

"A. No; I gave the price of the picture 'Chorus' for sale in writing in the Royal Academy salebook, reserving the copyright, but I gave the Royal Academy no instructions concerning the care of or disposition over the said picture. I relied entirely on the rules of the Royal Academy to protect my interests as regards non-copying and safe keeping.

"R. D. Q. 2. Had you previously known the exhibitions
44 of the Royal Academy, and the manner in which they were conducted, with especial reference to the copying of pictures while they were on exhibition?"

Defendant's counsel objects on same grounds as last objection. Objection overruled. Exception by defendant.

"A. Yes; I had known since 1873 the exhibitions of the Royal Academy and the manner in which they were conducted, with especial reference to the copying of pictures while they were on exhibition.

"R. D. Q. 3. If you answer 'yes' to the last question, please state what the rule or custom of the Royal Academy was with reference to allowing copies of the exhibited pictures to be made or taken at the exhibition?"

Same objection by defendant; same ruling and exception.

"A. The rule of the Royal Academy, as long as I have known it, has been that copies of the exhibited pictures are not on any account to be made or taken at the annual exhibitions at the Royal Academy by the public or even by the artists themselves, whose pictures are on exhibition, and not even a rough pencil sketch is allowed to be made by any one while the pictures are on exhibition.

"R. D. Q. 4. Did you rely on the rule, if any, stated by you in answer to the foregoing interrogatory, when you delivered your picture 'Chorus' to the Royal Academy for exhibition, as stated by you, or did you make any special arrangement or agreement with the Royal Academy with reference thereto? If so, please state what the arrangement was between you and the Royal Academy with reference to the right of the public, or visitors of the
45 Academy, or anybody, to copy said picture at and during the exhibition mentioned?"

Same objection by defendant. Same ruling and exception.

"A. Yes, I did rely on the rule stated by me in answer to the foregoing interrogatory when I delivered my picture 'Chorus' to the Royal Academy for exhibition. I did not make any special arrangement or agreement either in writing or verbally with the Royal Academy with reference thereto. As a matter of fact, if any such arrangement or agreement had been suggested by me with reference thereto, it would not have been for a moment entertained by the Royal Academy. The rules are made by the Royal Academy independently of the exhibitors at the exhibition, and they cannot in any way be altered by special arrangement or agreement with the exhibitors. The said rules are all framed by the Royal Academy in the interest of the general body of exhibitors; and there is an express rule of the Royal Academy that permission is not to be granted either to the public or visitors to the Royal Academy exhibitions to copy said pictures at and during the time of the annual exhibitions.

"R. D. Q. 5. Have you ever seen any copyright notice printed on or attached to any of the pictures exhibited at the exhibitions of the Royal Academy, or to their frames?"

Same objection by defendant. Same ruling and exception.

"A. No, I have never seen any copyright notice printed on or attached to any of the pictures exhibited at the exhibitions of the Royal Academy, or to their frames.

46 "R. D. Q. 6. If you have stated that no special agreement or arrangement was made between you and the Royal Academy concerning any copying of the picture 'Chorus' while it was on exhibition, state whether it was your understanding that the Royal Academy might allow the public, or visitors, or anybody

to copy said picture, and under what circumstances it should or would take any measures to prevent such copying?"

Same objection by defendant. Same ruling and exception.

"A. No; it was certainly not my understanding that the Royal Academy might allow the public or visitors, or anybody, to copy said picture. It is a strict rule of the Royal Academy that a copying of the pictures while on exhibition as strictly forbidden, even to the extent of a small pencil sketch.

"R. D. Q. 7. Do you know whether the Royal Academy received said picture under the same understanding as to copying explained by you heretofore? If so, state how you know this to be a fact?"

Same objection by defendant. Same ruling and exception.

"A. Yes, certainly. I know this to be a fact from an experience that I have had of thirty years as an exhibitor at the annual exhibitions at the Royal Academy.

"R. D. Q. 8. Did you know at that time what the rule of the Royal Academy was with reference to removing the picture from the exhibition before the exhibition closed? If so, please state what the rule was with reference to allowing such removal?"

Same objection by defendant. Same ruling and exception.

47 "A. Yes, I did know at that time what the rule of the Royal Academy was with reference to removing the picture from the exhibition before the exhibition closed. The rule was what it has always been since I have had to do with the Royal Academy that the picture was not to be removed before the exhibition closed.

"R. D. Q. 9. Please state when you sold the picture 'Chorus' and whether you informed the purchaser of said picture, at or before the time of said sale, of your previous sale of the copyright of the picture to the plaintiff, Emil Werckmeister?"

Same objection by the defendant. Same ruling and exception.

"A. As I have already testified, I sold the picture 'Chorus' in October, 1899, to Mr. Vincent Cotterell, and I did inform him as the purchaser of said picture before the time of said sale that I had previously sold the copyright of the picture to Emil Werckmeister."

Recross-examination read *de bene:*

"Re-X Q. 1. If you answer the first redirect interrogatory, to what person, giving his name, place of abode and official title, did you give or send the instructions in said first redirect interrogatory inquired about, and were such instructions in writing, and, if they were, produce a copy thereof to be annexed to your deposition, and if such instructions were verbal, state exactly what you said?

"A. I gave no such instructions as those inquired about in the first direct interrogatory as I have already stated in my reply thereto. The Council of the Royal Academy do not permit any such instructions to be given to them by any exhibitor. As I stated in my reply

to the first redirect interrogatory I did enter in the Royal Academy sale book the price that I wanted for the picture. I have not a copy thereof, but so far as I remember, it was to this effect; first
48 of all appeared the number of the picture; then under the word 'Title' I wrote 'Chorus'; then under the word 'price' I wrote '£500, copyright reserved'; and under the word 'Artist's name' I wrote the words 'W. Dendy Sadler.'

"Re-X Q. 2. If you answer the fourth redirect interrogatory, state whether the arrangement or agreement therein referred to was in writing, and if it was, produce the said writing, to be annexed to your deposition as a part thereof. If it was verbal, state what person, giving his name, place of abode and official title, the said arrangement or agreement was made with, and state what you said and what such person said exactly?

"A. In my answer to the fourth redirect interrogatory I have stated that I made no such arrangement or agreement, either in writing or verbally.

"Re-X Q. 3. If you answer the eighth redirect interrogatory, state whether or not the rule referred to therein was in writing. If so, produce the same or a true copy thereof and of the whole thereof.

"A. I believe the said rule is in print, but I have not a copy of it, and I have never seen it; but it is common knowledge amongst exhibitors at the Royal Academy that they cannot remove their pictures before the close of the exhibition, and, as a matter of fact, the Royal Academicians themselves cannot do so.

"Re-X Q. 4. If you answer the ninth redirect interrogatory, state the name and place of residence of the person to whom you sold said painting 'Chorus.' If the transaction with the purchase was either wholly or partly in writing produce the writing or a true copy thereof to be annexed to your deposition, and if any part of said transaction was oral, state exactly everything that was said by you and by the purchaser?

"A. I have already stated that the name of the purchaser
49 of my said picture "Chorus' is Mr. Vincent Cotterell, and that his place of residence is 76 Grosvenor street, in the County of London. The transaction with the purchaser was neither wholly nor partly in writing. It was entirely by word of mouth. Mr. Vincent Cotterell, who is a dentist, is an old friend of mine, and whilst dining with him some five years ago I casually remarked to Mr. Vincent Cotterell that I have never sold the picture; whereupon he asked me what I would take for it, and after some haggling we struck a bargain that I should sell the picture for £300, and the said picture was handed by me to him within a week. I was apprenticing my son to him, and he required £300 for the apprenticing of my son, and in payment of this £300 I handed him over the picture. He knew perfectly well at the time of my handing over the said picture to him, that I had already sold the copyright of the said picture, as he had the original photogravure issued by the Berlin Photographic Company hanging in his hall."

"FREDERICK ALEXIS EATON (incorrectly described in the commission as 'Frederick Eaton') of the Royal Academy of Arts, Piccadilly, in the County of London, England, Secretary of the Royal Academy of Arts, Piccadilly, aforesaid, of full age, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on behalf of the complainant and plaintiff, respectively, in the above entitled causes, doth depose and say as follows:

"Q. 1. What is your name, age, residence and occupation?"

Defendant's counsel objected to the question as incompetent, irrelevant and immaterial to either change the law or to change
50 the meaning of the statute, or for any other purpose. Objection overruled. Exception by defendant.

"A. My name is Frederick Alexis Eaton; I am of full age; my business residence is at the Royal Academy of Arts, Piccadilly, in the County of London, England, and I am Secretary to the said Royal Academy of Arts.

"Q. 2. Of which country are you a citizen or subject, and how long have you been such citizen or subject?

Same objection, ruling and exception.

"A. I am a British subject and I have been so all my life.

"Q. 3. Are you the Secretary of the Royal Academy at London, England? If so, please state how long you have been such secretary?"

Same objection, ruling and exception.

"A. Yes; I am Secretary of the Royal Academy at London, England, and I have been such secretary for more than 29 years last past.

"Q. 4. Please state whether the Royal Academy conducts any exhibitions of pictures in London and what your duties or functions are with reference to said exhibitions?"

Same objection, ruling and exception.

"A. The Royal Academy does conduct exhibitions of pictures in London, and as secretary my duties or functions are to supervise everything connected with such exhibitions; in fact I am the executive officer of such exhibitions acting under the orders of the president and council of the Royal Academy.

"Q. 5. State whether there was an exhibition of pictures
51 held by the Royal Academy in London during the year 1894, and if so, when it commenced and when it ended?"

Same objection, ruling and exception.

"A. Yes, there was an exhibition of pictures held by the Royal Academy in London in 1894, which commenced on the first Monday in May of that year and ended on the first Monday in August of that year.

"Q. 6. State whether you had personally anything to do with said exhibition of pictures in the year 1894, and if so, what?"

Same objection, ruling and exception.

"A. As I have already stated in my reply to the fourth interrogatory, I am the executive officer of the Royal Academy acting under the orders of the president and council, and I discharged the same duties in the year 1894, as in all other years, and I exercised the same general supervision over everything in connection with the exhibition of pictures in all the other years during which I have been secretary of the Royal Academy.

"Q. 7. Please state whether the public was admitted to that exhibition free of charge or upon payment of an entrance fee, and if so, what the amount of the entrance fee was?"

Same objection, ruling and exception.

"A. No; the public was not admitted to that exhibition free of charge, but had to pay sometimes a shilling and sometimes sixpence for admission. The usual fee charged to the public for admission to that exhibition was a shilling, but in the last week of that exhibition it was open to the public in the evening at sixpence, and
52 on the first Monday in August the fee charged to the public was sixpense all day and all the evening.

"Q. 8. Please state whether the visitors at said exhibition of the Royal Academy in the year 1894 were allowed to make any copies of the pictures there exhibited. If yea, state under what circumstances such copying was allowed?"

Same objection, ruling and exception.

"A. I answer this interrogatory absolutely in the negative.

"Q. 9. Has the Royal Academy any rule with reference to permitting the copying of pictures at its annual exhibition, and if so, please state what the rule is and how long it has existed and been in force?"

Same objection, ruling and exception.

"A. No, there is no such rule permitting copying; on the contrary, by Section 7, Clause 20 of the 'Abstract of the Constitution and Laws' of the Royal Academy of Arts, it is laid down that: 'No permission to copy works during the term of exhibition shall, on any account, be granted.' This rule has been in force ever since I have been secretary of the Royal Academy.

"Q. 10. If you stated that there is such a rule, please state whether said rule has been written or printed and when it has been made?"

Same objection, ruling and exception.

"A. The rule as to non-copying referred to in my last answer is printed in a book which is only for the use of academicians, and is not issued to the public. As I have already testified in my reply to the last preceding interrogatory it has been in existence ever since I have been secretary to the Royal Academy. It is a council
53 by-law which was passed at a council meeting held on the 6th day of May, 1847. The reason for their doing so appears on a minute of the council made on that occasion, of which the fol-

lowing is an exact copy: 'That so much property in copyright being entrusted to the guardianship of the Royal Academy, the council feel themselves compelled to disallow, in future, all copying within their walls from pictures sent for exhibition.'

"Q. 11. How is said rule as to the copying of pictures, if any, enforced during the exhibition of the pictures by the Royal Academy?"

Same objection, ruling and exception.

"A. There are three or more detectives in plain clothes always perambulating the rooms in which the pictures are exhibited, and if they see anybody copying the pictures they immediately stop them, and if any person persisted in his or her endeavors to copy any picture after being told not to do so he or she would be expelled, and therefore, as a matter of fact, the public are never permitted or allowed the opportunity of copying any pictures on exhibition, and so rigidly is this rule enforced that no photograph is ever allowed to be taken of any of the pictures while on exhibition.

"Q. 12. Is said rule, if any, brought to the attention of the visiting public at said exhibition, and if so, in what manner?

"A. No; except in the manner I have already testified to in my reply to the last preceding interrogatory that if they are caught by the plain clothes detectives in the act of copying the pictures they are stopped. Beyond that, there is no publication of the rule to the public.

"Q. 13. State whether said rule, if any, was in force and
54 enforced at the exhibition conducted by the Royal Academy during the year 1894 above mentioned?"

Same objection, ruling and exception.

"A. Said rule was in force at the exhibition conducted by the Royal Academy during the year 1894, but whether there was any occasion to enforce it I do not know.

"Q. 14. Have you ever seen on any of the paintings exhibited at the exhibitions of the Royal Academy in London, or upon the frames of said paintings, any notice or notices referring to some copyright? If so, please state what notices and in what languages?"

Same objection, ruling and exception.

"A. I have never seen on any of the paintings exhibited at the exhibitions of the Royal Academy in London, or upon the frames of said paintings any notice or notices referring to some copyright.

"Q. 15. Is it the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy to make any arrangement with the Royal Academy, its directors or officers, with reference to allowing the public to take copies of the pictures there exhibited? If so, please state what arrangement is made?"

Same objection, ruling and exception.

"A. No; it is not the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy to make any arrangement with the Royal Academy, its directors or officers, with

reference to allowing the public to take copies of the pictures there exhibited.

55 "Q. 16. In what building are the exhibitions of the Royal Academy held in London?

Same objection, ruling and exception.

"A. The exhibition takes place in the galleries of the Royal Academy, which galleries were built by the Royal Academy on a portion of the garden of Old Burlington House, Piccadilly.

"Q. 17. If you have stated that no particular agreement or arrangement is made by the artists sending their pictures to the Royal Academy for exhibition, what is your understanding as to the right of the Academy to copy the same or allow copies to be taken thereof by the visiting public or anybody else?"

Same objection, ruling and exception.

"A. All I can say, is, that during my long experience as secretary of the Royal Academy, the Council, as a body, have never copied any of the pictures which have been exhibited in the galleries of the Royal Academy or allowed other people to do so while the pictures have been on exhibition in the galleries of the Royal Academy.

"Q. 18. How long have you had and acted on the understanding between you and the exhibiting artists described by you in answer to the foregoing question?"

Same objection, ruling and exception.

"A. The rule as to non-copying of the pictures while on exhibition in the galleries of the Royal Academy has been in force ever since I have been secretary to the Royal Academy.

"Cross-examination:

"X Q. 1. Were you the secretary of the Royal Academy of
56 Arts during the time of its exhibition in the year 1894, in London, England?

"A. Yes, I was.

"X Q. 2. Is it not the fact that said exhibition in the year 1894 opened the first Monday in May in that year, and closed the first Monday in August in the same year?

"A. Yes.

"X Q. 3. Is it not the fact that the exhibition was opened to the public on each week day, except the first day, during the said period, from 8 o'clock forenoon until 7 o'clock afternoon?

"A. Yes.

"X Q. 4. Is it not the fact that the public generally were admitted to said exhibitions on each week day upon the payment of one shilling per admission?

"A. Yes.

"X Q. 5. Were there any private view days on which the public generally were not admitted. If there were, mention what days they were, and what classes of persons were admitted on such private view days, and what were the terms of the admission?

"A. Yes; there was a private view day of the press on Wednesday, May 2d, the whole day, and one on Thursday, May 3d, up till one o'clock, and then the rest of that day was the royal private view day. There was a general private view day on Friday, the 4th, and the dinner was on Saturday, the 5th. No charge for admission was made on any of those days.

"X Q. 6. Were the members of the said Royal Academy of Arts and the associate members of said Royal Academy of Arts and artists exhibiting at said exhibition, entitled to free admission to the exhibition?

"A. Yes.

"X Q. 7. Did not the persons and classes of persons referred to in the last preceding interrogatory visit the said exhibition in large numbers?

"A. Members and exhibitors and the wives and children of members all came in to the exhibition when they liked, but we
57 did not keep a special register of their admission. I have no doubt that during the season they did aggregate a large number.

"X Q. 8. Did not the public generally visit the said exhibition in large numbers on each of the public days thereof?

"A. Yes.

"X Q. 10. If you answered the 9th direct interrogatory affirmatively, state all you know about the subject-matter inquired of, and if there was any written rule upon the subject, state when that rule was adopted, in what book or books it is to be found and give the language of such rule exactly, and whether or not it was communicated to the public, and if so, how?

"A. In answer to the 9th direct interrogatory, I have testified that the Royal Academy has no rule with reference to permitting the copying of pictures at its annual exhibition, but that there is a by-law to the contrary effect, the exact language of which I have set out in the said 9th direct interrogatory, and I have given the full particulars as to where said by-law is to be found printed, when it was passed by the council, for whose use it is and how it is enforced in my replies to the 9th, 10th and 11th direct interrogatories.

"X Q. 18. If you answer to any of the direct interrogatories, in substance, that persons attending said exhibition are not permitted to copy the paintings exhibited thereat, do you mean that visitors to said exhibition are not at liberty to bring easels, canvas and painting materials, and copy paintings during the exhibition?

"A. I do mean that visitors to said exhibitions are not at liberty to bring easels, canvas and painting materials, and copy paintings during the exhibition. *A.* I have never received any letters, telegrams and other paper writings touching the subject-matter of this my deposition.

58 "X Q. 20. Was the picture 'Chorus,' by W. Dendy Sadler, exhibited at the exhibition of 1894, and if you answer yes, state by whom it was exhibited and whether or not it was for sale?

"A. Yes; the picture, 'Chorus,' by W. Dendy Sadler, was exhibited at the exhibition of 1894, and it was for sale.

"Redirect examination:

"R. D. Q. 1. Has the Royal Academy any rule concerning the removal of the exhibited pictures from the exhibition during the time of the exhibition? If, so, what is it, and was this rule in force during the year 1894?"

Same objection, ruling and exception.

"A. Yes. By Section 7 of Clause 6 of the 'Abstract of the Constitution and Laws' of the Royal Academy it is laid down in the following words: 'No work, when received and admitted, shall be taken away on any pretence before the exhibition for the year ends.' This is a rule which has been in force for very many years, and was in force during the year 1894.

"R. D. Q. 2. Was a person who intended to purchase any of the pictures exhibited at the Royal Academy exhibition of the year 1894 at liberty to take possession of such picture during the time while said exhibition was open, and if so, under what circumstances?"

Same objection, ruling and exception.

A. No; absolutely no.

"R. D. Q. 3. If you have heretofore testified that persons
59 attending the exhibitions of the Royal Academy are not permitted to copy the paintings exhibited thereat, did you mean that every kind of copying is forbidden at the exhibition, whether by painting, drawing, photographing or in any other manner?

Same objection, ruling and exception.

"A. Yes; I did mean that every kind of copying is forbidden at the exhibition, whether by painting, drawing, photographing or in any other manner.

"R. D. Q. 4. Is the rule as to copying at the exhibitions to which you have referred a rule of convenience so as to provide against any undue interference with the convenient inspection of the pictures by the visiting public, or is the rule designed and enforced to preserve the exhibitors' rights in the pictures?"

Same objection, ruling and exception.

"A. This rule has been in force for more than thirty years. I found it in force when I became secretary of the Royal Academy, but the reason why the rule was passed appears in my reply to direct interrogatory No. 10.

"R. D. Q. 5. Does the Royal Academy give any assurances to the exhibiting artists respecting the preservation of their rights in the exhibited pictures during the exhibitions, and if so, what assurance does it give to them and in what manner?

Same objection, ruling and exception.

"A. No.

"Recross-examination:

"Re-X Q. 1. If you answer the first redirect interrogatory,
60 state by whom the rule was adopted and when it was adopted, and in what book or record it was recorded, and produce a true copy of the rule and of the whole thereof.

"A. The rule referred to in the first redirect interrogatory and in my answer thereto was passed by the Council of the Royal Academy on December 30, 1768; it was then approved by the General Assembly in January, 1769, and it was sanctioned by the Sovereign in the last-mentioned year. This rule is recorded in the minutes of the Council, in the minutes of the General Assembly and in what is called 'The Royal Book,' in which all rules requiring the Sovereign's signature have to be entered, and the said book goes to the Sovereign for his signature to every such entry. I have already set out in my answer to the first redirect interrogatory a true and correct copy of the whole of the said rule.

"Re-X Q. 2. If you answer the second redirect interrogatory state whether or not the matter thereof was the subject of the rule, and, if so, when the rule was adopted, by whom it was adopted, in what book or record it was recorded, and produce a true copy thereof and of the whole thereof?

"A. Yes; it was the subject of the rule I have already quoted in my reply to the first redirect interrogatory, and I have already stated in my reply to the first recross interrogatory when the rule was adopted, by whom it was adopted, and in what book it was recorded. I cannot produce a copy thereof to be annexed to my deposition, but I have set out the exact language of the rule in my reply to the first redirect interrogatory.

"Re-X Q. 3. If you answer the third redirect interrogatory, was it not the fact in 1894 that a catalogue of said exhibition was published, at or about the time of the opening of said exhibition,
61 which contains reproductions of some of the pictures exhibited in said exhibition and were not reproductions of some of the pictures exhibited at said exhibition published in one or more of the illustrated newspapers published in England at or about the time of the opening of said exhibition, and were not notes of the said exhibition, containing illustrations or reproductions of some of the pictures exhibited thereat, published at or about the time of the opening of said exhibition?

"A. Yes, it is a fact that an official catalogue for the year 1894 of the paintings exhibited in the gallaries of the Royal Academy was published about the time of the opening of said exhibition, but such official catalogue published by the Royal Academy was not in any way illustrated. I have seen reproductions of some of the pictures exhibited at the exhibitions of the Royal Academy published in some of the English illustrated newspapers and magazines, but these are in no way official and are not even in the letter-press portion complete copies of the Royal Academy official catalogue.

"Sir LAWRENCE ALMA TADEMA, Knight, of No. 34 Grove End road, St. John's Wood, in the County of London, England, Artist and Academician of the Royal Academy of Arts, Piccadilly, in the County of London, aforesaid, aged 67 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on behalf of the complainant, and plaintiff in the above-entitled causes doth depose and say as follows:

"Q. 1. What is your name, age, residence and occupation?

"A. My name is Lawrence Alma Tadema; I was created a
62 Knight of the United Kingdom of Great Britain and Ireland in the year 1899; my age is 67 years and upwards; I reside at No. 34 Grove End road, St. John's Wood, in the County of London, England, and I am by profession an artist; and also an Academician of the Royal Academy of Arts, Piccadilly, in the County of London, England.

"Q. 2. Are you acquainted with the exhibitions of pictures annually conducted by the Royal Academy at London, England? If so, please state since when you have been acquainted with said exhibitions, and in what manner; whether as a visitor, or an exhibitor or both?

"A. Yes; I am acquainted with the exhibitions of pictures annually conducted by the Royal Academy at London, England. The first exhibition of pictures at the Royal Academy I attended as a visitor was in 1862, and the first time I exhibited my pictures was in 1869 on the opening of the new building of the Royal Academy. In the year 1876 I was elected an associate of the Royal Academy, and in 1879 I was elected a full member of the Royal Academy—an Academician—and I have been a member of the Council of the Royal Academy five times since my election as a full member and served for a period of two years on each of those occasions except the fifth, which has not yet terminated.

"Q. 3. Are you a member of the Royal Academy? If so, please state since when you have been a member thereof?

"A. Yes, I am, and I have fully answered this interrogatory in my reply to the second interrogatory.

"Q. 4. Where are the annual exhibitions of the Royal Academy held and during what months of the year?

63 "A. They are held in the buildings of the Royal Academy, Piccadilly, in the County of London, and they last from the 1st Monday in May until the 1st Monday in August. The galleries of the Royal Academy where the annual exhibitions are held are really built on part of the gardens of Old Burlington House, Piccadilly, London.

"Q. 5. Please state in what years you have yourself exhibited any pictures at the annual exhibitions of the Royal Academy?"

Objected to by defendant as irrelevant and immaterial. Objection overruled. Exception by defendant.

"A. From the year 1869 to the year 1902, both years inclusive.

"Q. 7. Please state what the custom of the artists is who exhibit their pictures at the annual exhibition of the Royal Academy with

reference to marking any copyright notice or notices thereon, or on the frames of the pictures?"

Objected to as incompetent; admitted and exception allowed.

"A. It is not the custom of artists who exhibit their pictures at the annual exhibitions of the Royal Academy to place on the pictures or on the frames any notice or notices as regards the rights to the copyright of the pictures they have painted.

"Q. 8. Have you ever put or seen on such pictures exhibited at the Royal Academy any notice or notices of copyright, or on the frames of the pictures? If so, please state what notice or notices you have seen thereon?"

Objected to on same grounds; admitted and exception.

64 "A. No, I have never put or seen on such pictures exhibited at the Royal Academy any notice or notices of copyright on or on the frames of the pictures.

"Q. 9. Do you know what the rule or custom of the Royal Academy is with reference to permitting the public or visitors *of* the exhibitions to make copies of the pictures exhibited at the annual exhibitions? If so, please state it?"

Objected to on same grounds. Admitted and exception.

"A. No such thing is or would ever be allowed as that of permitting the public or visitors to the exhibitions to make copies of any pictures exhibited at the annual exhibitions—not even notes. I recollect that on one occasion Mr. Linley Sanborne, the well known artist on *Punch,* complained to me of having been roughly handled by the servants of the Royal Academy for endeavoring to sketch on his shirt cuff a picture of Sir Edward Burne-Jones, and for persisting in doing it after being told not to do so, and I told him that he had to expect that sort of treatment for doing such a thing, as it was not allowed by the rules of the Royal Academy.

"Q. 10. Has the rule or custom described by you in answer to the last interrogatory been the same in previous years? If so, please state since when it has been in existence and enforced?"

Objected to on same grounds. Admitted. Exception by defendant.

"A. Yes, I do not think it has ever been otherwise; certainly not during my time.

65 "Q. 11. Have you ever seen any copying of pictures done during and at the exhibitions of the Royal Academy above described by you? If so, please state under what circumstances?"

Objected to on same grounds. Admitted. Exception by defendant.

"A. No, I have never seen any copying of the pictures done during and at the exhibitions of the Royal Academy.

"Q. 12. Does the Royal Academy keep any custodians in the gallery where the pictures are exhibited at its annual exhibitions to enforce the rules and regulations of the Academy with reference

to the copying of pictures? How long have you known the condition described by you in answer to the last interrogatory to exist?"

Objected to on same grounds. Admitted. Exception by defendant.

"A. Yes; besides the various officials of the Royal Academy in uniform, whose duty it is to see that the pictures are in no way damaged, there are also persons employed by the Royal Academy who are in plain clothes, whose duty it is to see that the rule against copying of pictures which are exhibited at the annual exhibitions is strictly enforced, and I have personally known of the existence of this rule from the first year that I exhibited any pictures thereat.

"Q. 13. What is your understanding as an exhibitor and as a member of the Royal Academy with reference to the rights which the Royal Academy has in the pictures delivered to it by the
66 exhibitors for exhibition, and particularly with reference to taking or making copies thereof, and allowing copies thereof to be made?"

Objected on same grounds.

The COURT: I will let that in. It is doubtful, but I will let it in.

Defendant excepted.

"A. My understanding as an exhibitor and as a member of the Royal Academy is, that the Royal Academy has no right to take or to make or to allow copies of any pictures exhibited at their annual exhibitions to be made, but they are expected to protect the rights of the exhibitors, and the rule which they enforce against the copying of pictures by the public is strictly enforced in order to protect the rights of the exhibitors.

"Q. 14. How long have you had and held the understanding described by you in answer to the last interrogatory with reference to the relations between exhibiting artists and the Royal Academy?"

Objected to on same grounds. Admitted. Exception.

"A. As long as I have been connected with the Royal Academy."

By DEFENDANT'S COUNSEL: It is understood that to each one of those questions my objection is as stated in the last objection and I have an exception.

67 The COURT: Yes.

Plaintiff's counsel offers in evidence a certificate of the Register of Copyrights. It is an application dated March 31st ——.

Defendant's counsel objects to it on the ground that it is incompetent, irrelevant and immaterial and giving no right in view of the nature of the assignment to the plaintiff.

It is admitted. Exception by defendant.

Marked Plaintiff's Exhibit D.

PLAINTIFF'S EXHIBIT D.

Photographische Gesellschaft, Berlin.

BERLIN, *March 31st,* 1894.
GERMANY.

To the Librarian of Congress, Washington, D. C.:

SIR, 1.50 Painting Photo on file

Please find enclosed Doll. 1.50 for record fee and certificate of copyright for a painting by W. Dendy Sadler entitled "Chorus" of which we are the proprietors of the copyright and of which the following is a description:

A company of gentlemen with filled glasses singing in chorus.

We also enclose a photograph of the painting as required by law, and request that the certificate of copyright be sent to the care of the Berlin Photographic Company, 14 East —— New York City.

Very respectfully,
PHOTOGRAPHISCHE GESELLSCHAFT.

68 Library of Congress
Copyright
194882 Apr 16 1894
Washington, D. C.

I hereby certify that the above is a complete and correct copy of the letter of application for copyright registration made by the Photographische Gesellschaft, Berlin, dated March 31st, 1894, and received at the Copyright Office on the sixteenth of April, 1894, for entry of a painting by W. Dendy Sadler, entitled "Chorus," and with such marks, in addition, as were put upon the letter of application after its receipt in the Copyright Office to show that the $1.50, the amount of the fee, was duly received, that the photograph required was on file, and giving the date of the entry and the entry number. In witness whereof, the seal of Congress has been hereto affixed, this twenty-fifth day of August, 1902.

HERBERT PUTNAM,
Librarian of Congress,
By THORWALD SOLBORG,
Register of Copyrights.

Plaintiff's counsel offered in evidence the certificate of the Librarian of Congress as to the copyright on the picture in question, dated June 23, 1902.

Same objection, same ruling and exception. Marked Plaintiff's Exhibit E.

PLAINTIFF'S EXHIBIT E.

No. 19,488.

LIBRARY OF CONGRESS, *To wit:*

Be it remembered that on the sixteenth day of April, anno
69 domini 1894, Photographische Gesellschaft, of Berlin, Ger., have deposited in this office the title of a painting, the title or description of which is in the following words, to wit: "Chorus," W. Dendy Sadler. (Photo. on file.) A company of gentlemen with filled glasses singing in chorus; the right whereof they claim as proprietors in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD,
Librarian of Congress.

I hereby certify that the foregoing is a true copy of the original record of copyright.

In witness whereof, the seal of the Librarian of Congress has been hereto affixed this twenty-third day of June, 1902.

HERBERT PUTNAM,
Librarian of Congress,
By THORWALD SOLBERG,
Register of Copyrights.

[SEAL.]

Office of the Register of Copyrights, Washington, D. C.
Written, J. S. & L. O.
Revised, H. d. K. W.
Mailed, W. J. P.

EUGENE EBLE, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination:

Q. State your age and residence?

A. Eugene Eble; age, 28; residence, 230 West One Hundred and Twenty-ninth Street, New York; occupation, clerk with Briesen & Knauth, plaintiff's attorneys. I have seen a picture such as
70 now shown me (referring to Plaintiff's Exhibit G). I first saw that picture in June, 1902, in the window of a cigar dealer on Seventh avenue, New York City. Charles Eidler was his name. I think the number was 476 Seventh avenue; it was somewhere near Thirty-first street.

THOMAS C. MILLER, called as a witness for the plaintiff being duly sworn, testifies as follows:

Direct examination:

Q. What is your residence and occupation?

A. My residence is 572 East One Hundred and Seventy-eighth street; occupation, picture framing. My occupation in the year 1902, and especially in June, 1902, was the same as now. My business then was at 161 West One Hundred and Twenty-ninth street in the City of New York. I did business under the name of W. H. Ketcham & Company. The business of that concern was picture framing. In the month of June, 1902, I saw a picture such as was exhibited here by the witness Eble. The picture was brought to our establishment to be framed by Mr. Lester Ketcham, and also a member of the firm, and I saw it going through the process of being framed and after it was framed. I have only a distinct remembrance of seeing two copies of this picture at about that time. I saw those two in our factory. That was the place that I speak of. It was a factory. Mr. Ketcham brought those pictures to our factory. Mr. Ketcham was then the president of the company. I had no conversations or transactions with the defendant, the American Tobacco Company, in reference to this picture. I never did. The American Tobacco Company paid for the framing of these pictures.

71 I know of only these two pictures that were framed. I do not know with positiveness that any more were framed but these two; there were others about there. Those two copies stood against the wall where we usually placed completed work until it was ready to be delivered. They were placed against the wall so as to be exposed to public view.

Cross-examination:

They were in the office and finishing room of the factory. Our office and finishing room had no partition between them. The public was admitted to the place where these pictures were.

OTTO VON SCHRENK, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination:

Q. State your age, residence and occupation?

A. Thirty years of age; reside in New York City, and am an attorney and counsellor-at-law by occupation in the employ of the firm of Briesen & Knauth, the solicitors for the plaintiff in this case. I first saw the picture which has been described by the witness here, I mean this same picture (referring to Plaintiff's Exhibit G) on June 23, 1902, in the office of the American Tobacco Company. On that day I accompanied a Deputy United States Marshal, who had a writ of replevin, to the office of the American Tobacco Company. That office was at 111 Fifth avenue, in the City of New York. When I went there with the marshal we first saw Mr. Junius Parker. He was, I was informed, an attorney for the American Tobacco Com-

pany. He was at the office of the American Tobacco Company. I had conversation with Mr. Parker.

Defendant's counsel objected, as Mr. Parker's relations to the defendant company is not shown.

Examination of this witness suspended.

72 JUNIUS PARKER, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination:

Q. Will you give us your residence?

A. I live in New York City, 14 East Sixtieth street. I am a lawyer. I have — connection with the defendant, the American Tobacco Company, since March, 1899. My office since has been at 111 Fifth avenue, New York City; that is the office of the American Tobacco Company. I am assistant general counsel on a salary.

Q. Did you have any transactions with the plaintiff or the plaintiff's manager, Mr. Schutze, with reference to the picture "Chorus" which has been discussed in this case?

A. I had transactions; yes, sir. I had some correspondence with the plaintiff's manager. I wrote to Mr. Schutze certain letters.

Q. Will you please look at this letter dated June 27, 1901, addressed to Mr. L. L. Schutze, manager Berlin Photographic Company, 14 East Twenty-third street, city, and tell us whether you wrote and sent him such a letter?

DEFENDANT'S COUNSEL:

Q. Were you present when the witness Mr. von Schrenk, who immediately preceded you called at your office with the United States Deputy Marshal?

A. Yes, sir; I was present when the Deputy Marshal came with a gentleman from the office of Briesen & K-auth with a writ of replevin, and I was so told. This letter I have in my hand was written a year, I should say, before that visit of the Deputy Marshal.

PLAINTIFF'S COUNSEL: Mr. Parker, did you write that letter?

A. I wrote that letter and signed it.

73 Plaintiff's counsel offered that letter in evidence.

Defendant's counsel objects, as his authority to write the letter does not appear. He was not in that respect acting as an attorney; he was acting as any other agent.

By PLAINTIFF'S COUNSEL:

Q. What was the nature of your duties as attorney for the American Tobacco Company?

A. It is difficult for me to answer that question. I am only an attorney for the American Tobacco Company and I am paid a salary perhaps of the convenience. I have no authority to represent the company other than as an attorney. I frequently got letters written to me and answered such letters; I am advised with by the officers and employees of the company from time to time about various mat-

ters, but there is some difficulty in defining just what my powers and duties are. Frequently I was asked—not very frequently I was asked about copyright and advised about any matter that had legal phases; and so far as any question of infringement of copyright they would come to me for advice. In carrying out my duties in that regard I sometimes carried on correspondence with parties making claims.

Q. Was it in connection with your duties in that regard that you wrote this letter of June 27th, 1901?

Defendant's counsel objects that the witness has no right to disclose any communication that was made by an officer or employee of the defendant to the witness in his professional capacity.

Objection overruled. Exception by defendant.

74 A. Yes. Previously to that date I had conversations with Mr. Schutze, the manager of the Berlin Photographic Company.

Plaintiff's counsel offered that letter in evidence.

Defendant's counsel objected to it as incompetent on the ground that the authority to write that letter is not shown. Assuming that all questions of qualifications of the witness Mr. Parker were removed, what have these letters got to do with the case? We are trying a simple issue here as to whether the plaintiff has a right to this property. This is an action for property; it is a replevin suit. What has this got to do with it?

The COURT: I will admit this letter of June 27th.

Mr. JENNER: Exception by defendant.

Marked Plaintiff's Exhibit F.

Defendant's counsel admitted that Mr. Parker will testify the same with regard to the letter dated April 25, 1902, as he testified with regard to the preceding letter, and objected to the introduction of the letter, and made the same objection to that that was made to the introduction of the other.

Objection sustained.

JUNIUS PARKER resumed the stand.

By PLAINTIFF'S COUNSEL: The picture identified by the witness Schrenk as having been seen by him in June, 1902, at the American Tobacco Company's office, is offered in evidence.

Marked Plaintiff's Exhibit G.

75 Q. Mr. Parker, will you please tell us when first you saw any picture like the Exhibit G which I now show you.

Defendant's counsel objected on the grounds that defendant is entitled to claim the witness is privileged as counsel. Defendant is also entitled to object to any answer or disclose which may be made by him that would tend to subject defendant to a penalty and forfeiture.

Objection overruled. Exception by defendant.

By the COURT:

Q. When did you first see the picture?

A. I do not recall; I cannot recall at all; in fact, I cannot recall distinctly ever having seen it before.

OTTO VON SCHRENK resumed the stand.

PLAINTIFF'S COUNSEL:

Q. Did you have any conversation with Mr. Parker on that occasion?

A. I did.

Q. Tell us what the conversation was?

Defendant's counsel objects on the ground that no conversation is binding on the defendant until witness' authority to make the statement is shown, or until a special authority can be presumed; and also that the witness was present there with the United States Marshal in the execution of an illegal writ or process, and therefore everything which Mr. Parker may have said was extorted from him under an illegal process. This replevin was entirely illegal and unconstitutional and was in violation of defendant's constitutional rights.

Objection overruled. Exception by defendant.

76 A. In the first place Mr. Parker said he would have to see Mr. Duke, the president of the American Tobacco Company, and the marshal served upon the president the papers, complaint, etc., under the replevin. That was in the offices of the defendant company.

Q. What occurred next?

A. We returned to Mr. Parker's office, and Mr. Parker sent a message to a Mr. Wilson. Mr. Wilson came down to the office of Mr. Parker, and Mr. Parker asked him to prepare a statement as to the number—Mr. Parker asked Mr. Wilson to prepare a statement of the chromos "Here's to Old England;" that is the way I think he designated them at the time. There was such a chromo before us. The attorneys for the plaintiff in this case had a copy of it in their possession, and this copy I took with the replevin papers to the office of the American Lithographic Company, and it was shown to Mr. Parker and Mr. Wilson at the time these replevin papers were presented.

Q. Did you see any copy of that picture at the office of the American Tobacco Company?

A. Those I saw subsequently. The marshal, the manager of the Berlin Photographic Company, Mr. Wilson and myself went up stairs to another room of the American Tobacco Company, which was the office of the Curve Cut Department, and we there searched for copies of these chromos. I went with Mr. Wilson on behalf of the American Tobacco Company. He made a search; we stood next to him and accompanied him around the room.

To DEFENDANT'S COUNSEL: The Marshal was present.

PLAINTIFF'S COUNSEL:

Q. What copies did you see?

77 Defendant's counsel objects on the ground that it was in the execution of an illegal process.

Objection overruled. Exception by defendant.

A. In the first place there were a number of copies hanging on the wall. They were exposed to view. They were framed and hanging in the office of the Curve Cut Department. They were in all respects like this picture, Exhibit G, so far as the photographs, the arrangement of figures are concerned, but they differed slightly. One of them, as I understand, was an original oil painting; another was this same picture painted on silk. Exactly the same chromo, printed on silk.

Q. Please tell us further what you did with reference to those copies?

A. In addition to those two framed pictures of which I have spoken, there were, as I recollect it, four others framed in simple frames, and those were pictures exactly like this. I am not quite positive whether each of them had the inscription, "Old English Curve Cut Pipe Tobacco" on it or not; my recollection is at least one of them did. In addition to these Mr. Wilson took out of the drawer further copies in all respects like this, there being, however, three kinds. One kind had a strip of tin at the lower and at the upper edge which were called hangers; others were like this; in other respects they were like this. We counted them. We found altogether 203 copies, if my recollection is correct on that point.

Defendant's counsel moved to strike out the number that was found on the same ground that was last stated. This was in the execution of an illegal process.

The evidence was admitted and motion denied. Exception by defendant.

78 TO DEFENDANT'S COUNSEL: The Marshal was with me.

TO PLAINTIFF'S COUNSEL: While we were making this search and examining these pictures a statement was being prepared by Mr. Wilson, a typewritten statement. This was taken down stairs to the office of Mr. Parker and a further conversation had with Mr. Parker in regard to the number of copies that had been found, and Mr. Wilson handed him a copy of the statement which he had prepared. Mr. Parker thereupon said that nothing could be done; that the Marshal should go ahead and execute his writ. I saw that statement. We all went up stairs and Mr. Wilson took the statement up stairs, and I then asked him for a copy of the statement and he had the office boy make a press copy of that statement, and that press copy he handed to me. This is the press copy of the statement which Mr. Wilson handed to me.

Plaintiff's counsel offered that in evidence.

Defendant's counsel objected to it on the same grounds as last and on the ground that Mr. Wilson has not been shown to have any

authority or any knowledge on the subject, and that this was in the execution of an illegal process.

Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit H.

Plaintiff's counsel reads statement to jury.

Q. Did you have any further conversation there with Mr. Wilson or with Mr. Parker?

A. Not with Mr. Parker, but Mr. Wilson procured a box, a small case, and these pictures that had been found were carefully packed up in that box. The box was nailed up and I wrote the name of the case on the outside of the box, and then I went out and pro-
79 cured a truckman, put the case on the truck, and had the case brought down to the Marshal's office in this building. Exhibit G is one of the pictures found on that occasion. I took it out of the case this morning.

Cross-examination:

Q. The United States Marshal was with you during all of this time?

A. He was. The writ of replevin was presented to Mr. Duke, and presented to Mr. Parker, and to Mr. Wilson. I do not remember of it ever being shown to Mr. Wilson. He came in after it was served. It was served on Mr. Parker.

FRANCIS A. WILSON, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination:

Q. Will you state your residence and occupation?

A. New York City. My present occupation is an employee of the Havana Tobacco Company. I have been in the employ of the American Tobacco Company from June, 1898, to about March, 1903. During June, 1902, I believe the most of my time was given to the sales of the brand of pipe tobacco called "Old English" at that time, the bargaining and sale with the jobbing trade. That company did not have a department officially called the "Curve Cut Department." It might be so spoken of around the office. That was my brand; that was all I had to do with it; that I was handling.

Q. Did you at that time have anything to do with chromo pictures like this Exhibit G (handing exhibit to witness)?

A. I decline to answer.

Q. Why do you decline to answer?

A. Because my answer will tend to subject the American Tobacco Company and myself to penalty.

80 DEFENDANT'S COUNSEL: The defendant also claims that the witness is privileged; that it is also the defendant's privilege, and that it shall be protected against disclosures made by its agents.

Question was withdrawn.

By PLAINTIFF'S COUNSEL:

Q. Did you do anything with pictures like Exhibit G in your own interest, or was everything that you have done with reference to such pictures done in the interest and on behalf of the defendant, the American Tobacco Company?

Defendant's counsel objects on the same grounds.
Objection overruled. Exception by defendant.

By the COURT:

Q. Was what you did in the interest or on behalf of the American Tobacco Company?
A. I decline to answer.

PLAINTIFF'S COUNSEL: I ask your Honor to direct the witness to answer it.
Defendant's counsel objected on the ground that Court would be compelling witness to testify against himself.
The COURT: I rule the witness ought to answer that question.
Exception by defendant.

A. I helped the other brand managers produce advertising material of this general character, together with my work, as I said before, in connection with "Old English Curve Cut Pipe Tobacco."
Those two were all my duties at that time.

81 Q. Was what you did with reference to pictures like Exhibit G done solely on behalf of the American Tobacco Company and as an employé of that company?

Defendant's counsel objects on the same grounds. Overruled. Exception.

A. On behalf of the American Tobacco Company.
Q. Did you on behalf of that company send any of these pictures to the Deuther Manufacturing Company of Buffalo.

Defendant's counsel objects on the same ground. Overruled. Exception.

A. Did I send them personally?
Q. Yes, that is my question.
A. I did not.
Q. Do you know whether any of these pictures were sent to the Deuther Manufacturing Company from the American Tobacco Company?

Defendant's counsel makes the same objection. Overruled. Exception.

A. I believe not. I have no reason to think they were.
Q. Please state whether you have any knowledge as to the number of copies of these pictures distributed by the American Tobacco Company?

Defendant's counsel objected on the same ground. Overruled. Exception.

A. I hardly know how to answer you. "Any knowledge of copies distributed."

Q. What is your difficulty?

A. Well, to recall just what was done, you know.

Q. Do you know whether any copies of this picture were distributed by the American Tobacco Company?

A. I decline to answer.

82 The WITNESS (to the Court): Do you instruct me to answer?

The COURT: I do.

A. Yes.

Q. Do you know when they were distributed?

A. I could not tell you.

Q. In what year?

A. 1902.

Q. And that was previous to the time when the Marshal came to seize the pictures in your office?

A. Yes. I remember the call of the Marshal. I don't remember seeing Mr. Schrenk before. I could not be sure of the Marshal. I think there were two gentlemen with the Marshal. It was not necessary to search for pictures of this kind at the office. They were open. We just delivered them. There was no need of searching for them.

By the COURT:

Q. What did you do?

A. The Marshal came in and saw what was on my desk and on the walls and took them. I did not give them to him. He did not ask for them.

Plaintiff's counsel offered to read in evidence a stipulation.

Defendant's counsel objected to the whole of it, pursuant to the reservation contained in the last paragraph, on the ground that the process of replevin that was executed by the Marshal in Buffalo was an invasion of defendant's constitutional right, was an unwarrantable search, an illegal act, and nothing done under it, or information obtained by virtue of it can be used in evidence against defendant under the Fourth and Fifth Amendments of the United States Constitution.

83 The COURT: This stipulation is admitted and the objections are noted and an exception to counsel for the defendant allowed.

Plaintiff's counsel reads the stipulation to the jury as follows:

"It is hereby stipulated by and between the attorneys for the respective parties to the above-entitled action that Charles F. Sturm, if called as a witness at the trial of this action, would testify that he is now and was on July 29th, 1902, the Deputy United States Marshal at Buffalo, N. Y.; that on said 29th day of July, 1902, he served a copy of the writ of replevin entitled in this action and dated July 23, 1902, together with a copy of the papers thereto attached, to wit: the affidavit of Ludwig H. Schutze and Exhibit 'A,' being a copy

of a picture entitled 'Chorus,' which papers were filed in the office of the Clerk of this Court on August 5, 1902, upon Lorenz A. Deuther, superintendent of the Deuther Manufacturing Company, at Buffalo, N. Y., together with a copy of the bond given in this action, and filed in the office of the Clerk of this Court on July 22, 1902, and then and there replevied at the place of business of the Deuther Manufacturing Company, at Buffalo, N. Y., nine hundred and ninety-three (993) chromo-lithographs like Exhibit '5' offered in evidence by plaintiff during the taking of certain testimony of Ludwig H. Schutze on July 8th, 1903, said exhibit being hereto attached.

"It is further stipulated that Lorenz A. Deuther, if called as a witness at the trial of this action, would testify that on July
84 29th, 1902, he was the superintendent of the Deuther Manufacturing Company, at Buffalo, N. Y., that shortly previous to said date the defendant herein sent to the Deuther Manufacturing Company a number of chromo-lithograph pictures identical with the pictures hereto annexed and marked 'Defendant's Exhibit 5' and directed the said Deuther Manufacturing Company to frame such of them as defendant might from time to time direct it to frame and deliver; that on July 29, 1902, there were nine hundred and ninety-three (993) copies of the said defendant's picture 'Old English Curve' still at the factory of the Deuther Manufacturing Company in Buffalo, N. Y., and that said nine hundred and ninety-three (993) copies were held by said Deuther Manufacturing Company as framers of such pictures only in pursuance to said directions and subject to the direction and control of the American Tobacco Company, and that said Deuther Manufacturing Company neither had nor has any interest in said prints or pictures whatsoever; and that said nine hundred and ninety-three (993) copies were on said 29th day of July, 1902, replevied by the United States Marshal at Buffalo.

"This stipulation is made subject to such objections and exceptions to the competency, immateriality and relevancy thereof, or any part thereof, as may be made by either party at the trial.

"Dated New York, November 11, 1904.

"BRIESEN & KNAUTH,
"Attorneys for Plaintiff.
"WETMORE & JENNER,
"Attorneys for Defendant."

The above stipulation is marked Exhibit J.

85 Plaintiff's counsel states to jury: There is annexed to this stipulation a copy of the same print which you have seen before here, somewhat torn. It is essentially the same picture as Exhibit G.

Plaintiff's counsel offers in evidence the proceedings had in this Court upon the execution of a writ of replevin, that is the original writ of replevin, issued on July 21, 1902; together with an undertaking dated July 21, 1902; an affidavit of Ludwig H. Schutze, veri-

fied on July 19th, 1902, and a small lithographic copy of the picture in question, marked Exhibit A.

Defendant's counsel objects on the same grounds as stated to the introduction of the stipulation, namely, that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and plaintiff cannot avail of them as evidence in this case, on account of their illegality.

Objection overruled. Exception to defendant.

Plaintiff's counsel offers in connection with these papers the return of the Marshal endorsed on the papers.

Defendant makes the same objection. Overruled. Exception.

This set of replevin papers marked Exhibit K.

Plaintiff's counsel further offered in evidence proceedings upon another replevin executed in this action on June 23, 1902, consisting of a writ of replevin, two bonds or undertakings, a summons, a direction to the Marshal, an affidavit of Ludwig H. Schutze, verified June 20, 1902, a copy of the picture annexed thereto, marked
86 Exhibit A, and also the return of the Marshal dated June 3, 1902, and copies of the picture attached to these papers.

Defendant's counsel makes the same objection to that as made to the other replevin papers. Objection overruled. Defendant excepts.

Marked Exhibit L.

The COURT: You say he is not entitled to the possession until the forfeiture occurs?

DEFENDANT'S COUNSEL: Yes. Forfeiture can never take place until a judgment of forfeiture is rendered by a Court of Record; nor has a plaintiff any right to replevin goods unless they are the plaintiff's own goods, and they are not his until a judgment or forfeiture has been entered, under the shield of the Court; and yet this illegal proceeding, in which the plaintiff claims, assuming that the ordinary forms of complaints in replevin were adopted—yet this proceeding, in which the plaintiff, without any shadow of a right to the possession of these goods, uses the process of the United States Court to go into a man's business office and seize his goods and carry them away and then bring them into Court and present them before you and say "By virtue of this seizure, against which the constitution expressly provides, I present to you the evidence on which I ask you to declare a forfeiture—to adjudge a forfeiture, and adjudge a liability to a penalty." I say it cannot be sustained with due respect to your Honor.

The very title of the person entitled to the forfeiture depends upon the judgment of the Court. The judgment of the Court is essential to make forfeiture.

The COURT: The right is incurred the moment the law is violated.

87 By DEFENDANT'S COUNSEL: The right to have a judgment or forfeiture in a case duly presented. Where is the equitable title to the goods until that occurs. *Non constat* that there ever will be a forfeiture. It all depends upon the judgment of the Court. That is the essential thing to give title. Claim does not give title.

That point is held in the Boyd case, and that is what is constantly held in matters of forfeiture.

By PLAINTIFF'S COUNSEL: The stipulation that I read to your Honor is express on that point. It certifies that the Deuther Manufacturing Co. had no possession; that these pictures were sent to the Deuther Manufacturing Co. to be held by that company subject to the possession of the American Tobacco Company.

The COURT: Let me look that over again before it goes to the jury. I supposed you were proving it for the purpose of showing a publication and distribution.

By PLAINTIFF'S COUNSEL: I want to prove the value of these prints, as the action takes the form of an action in replevin, and the Code of Civil Procedure requires the value to be given.

By DEFENDANT'S COUNSEL: What do you say their value is?

By PLAINTIFF'S COUNSEL: I should say five cents a sheet for these here.

By PLAINTIFF'S COUNSEL: I want to give some evidence, but because the Code of Civil Procedure requires that the value be
88 given, I need not prove any particular value, but I must prove some value.

By DEFENDANT'S COUNSEL: We will admit that the value of the prints exceed $1,000.

By PLAINTIFF'S COUNSEL: Then it is admitted by the defendant. I will not state it as an admission by the plaintiff.

By PLAINTIFF'S COUNSEL: I come next to the deposition of Mr. Schutze.

By PLAINTIFF'S COUNSEL: Then I will read in evidence from the deposition of Ludwig H. Schutze, questions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

The COURT: I will allow you so much of Schutze's deposition as shows what you did for the purpose of procuring a copyright, and I think the rest of it is immaterial.

By PLAINTIFF'S COUNSEL: If your Honor makes such an entry in your minutes, any defect can be cured when the case comes to be settled on appeal.

The COURT: I make a memorandum that all of Schutze's deposition is let in which relates to the steps taken to secure the copyright.

By DEFENDANT'S COUNSEL: That is in under our objection that it is incompetent in view of the assignment and its nature.

The COURT: Yes.

89 By PLAINTIFF'S COUNSEL: I want also to have that portion of Mr. Schutze's testimony which relates to his conversation with Mr. Parker and the publication of the posters by the American Tobacco Company.

Defendant's counsel objects.

Plaintiff's counsel reads portions of the deposition of LUDWIG H. SCHUTZE, as follows:

"My name is Ludwig H. Schutze; age 34; residence Flatbush, Long Island; occupation, manager of the Berlin Photographic Company, New York. I know the complainant, Emil Werckmeister. I

have been in his employ since the year 1889; first in Berlin, and since the fall of 1892 over here in New York City. The Berlin Photographic Company, at No. 14 East Twenty-third Street, is the American branch of Mr. Werckmeister's business. I have been manager of that branch since the beginning of 1894, and am now. I am about to leave this country about the middle of August, 1903, probably permanently. I intend to go to Europe. I have a recollection of mailing to the Librarian of Congress at Washington in the year 1894, an application for the granting of a copyright upon the picture 'Chorus' mentioned in this suit. I have here a certified copy from the Registrar of Copyrights of a letter addressed to the Librarian of Congress, dated March 31, 1894, and signed Photographische Gesellschaft. This letter, addressed to the Librarian of Congress, was sent us by our Berlin house, and we forwarded it to the Librarian of Congress with a fee of one dollar and a half for copyright entry. We also enclosed in the letter a photograph such as is stated therein. That photograph represented a group of men, some of them sitting around a table, one of them standing with a glass in one hand and with a pipe in the other, the others
90 evidently singing in chorus. This is a copy of the picture of which we sent a photograph (referring to Exhibit A). The photograph was rather a small size, about cabinet size. It was sent us from Berlin, together with this letter of application for copyright of March 31, 1894, by the complainant. About publishing this picture in the United States of America, later on we received samples of the photogravure which has been offered in evidence, and it was offered to the trade throughout the country; orders were taken from samples, and it was sold about the fall of the year 1894. According to my recollection, this picture was not published by our house in the United States before the month of June or July, 1894. We received the copies of the picture which we sold in the United States from Berlin. On the plate margin of the copies of the picture 'Chorus' which we sold in this country, there is an engraved notice which reads: 'Copyrighted, 1894, by Photographische Gesellschaft.' This notice of copyright was contained on all the copies of said picture which we sold in this country, the small as well as the large ones.

"My attention was first called to a copy of the picture 'Chorus' exhibited in the tobacco department of Siegel-Cooper's in June, 1901, in New York City.

"Q. State what you did when you ascertained this fact.

"A. I asked the gentleman in charge there where this copy came from, and was informed by him that it had been furnished him by the American Tobacco Company.

"DEFENDANT'S COUNSEL: I move to strike out the answer so far as it relates to information given the witness by any one else; the same being hearsay.

"Q. Now proceed with your answer.

91 "A. Thereupon I called upon the American Tobacco Company, where I had an interview with what I understood was

their legal adviser or his assistant. It was either Mr. Parker himself or his assistant that I saw at the time. He told me that Mr. Parker would look into the matter and let me know about it.

"This interview took place at the office of the American Tobacco Company, at No. 111 Fifth Avenue, New York City. I afterwards received a communication from the American Tobacco Company or its attorney, probably in the first days of July, 1901.

"Q. 63. Now please state what happened after April 25th, 1902, with reference to this picture 'Chorus?'

"A. On June 18th I saw at the shop of W. H. Ketcham, West Twenty-ninth Street, a framed copy of the poster.

"Q. 64. Here in New York City?

"A. In New York City.

"Q. 65. Can you identify the poster to which you have referred?

"A. Yes, I can.

"Q. 66. Please do so.

"A. This is a copy of the poster which I found there: (Referring to Exhibit G.)

"Q. 67. Where did you see a copy of this poster at Ketcham's store?

"A. It was standing on the floor near the entrance.

"Q. 68. What was Ketcham's business?

"A. He is a framer.

"Q. 69. Did you see any other copies besides the one mentioned by you at Ketcham's store at that time?

"A. Upon inquiry I was shown some more copies which Mr. Ketcham had in the drawer.

"Q. 72. Were they like the copy which you have produced?"

Defendant's counsel makes the same objection. Overruled. Exception.

92 "A. Well, they all showed the same picture, but there were some printed on satin.

"Q. 73. Were they all in colors?

"A. They were all in colors.

"Q. 74. And in the colors like Plaintiff's Exhibit G, defendant's poster?

"A. Yes.

"Q. 75. I notice that this Plaintiff's Exhibit G bears the legend 'Old English Curve Cut Pipe Tobacco.' Was that legend on the copies which you saw in Ketcham's stores?

"A. I am not quite sure whether it was on all the copies, but my recollection is that it was.

"Q. 76. Now state what you know with reference to the execution of a writ of replevin in this action on the 23d of June, 1902?

"A. On or about that date I went with the United States Marshal to the office of the American Tobacco Company at 111 Fifth Avenue, in this city. There we found in the office *of* a Mr. Wilson, supposed to be in charge."

By DEFENDANT'S COUNSEL: That is objected to.

The COURT: This is all cumulative.

The COURT: I don't think you have proved your number of copies. Are you agreed on the number of copies—1,196 copies?

By PLAINTIFF'S COUNSEL: Yes, the Marshal's returns show the exact number, and, as I say, they are here in Court, within our reach, and that is our case.

Plaintiff rests.

By DEFENDANT'S COUNSEL: I shall not offer any evidence. I move to dismiss the complaint on the ground——

93 The COURT: To direct a verdict, in this Court.

The COURT: We do not dismiss in this Court; we direct a verdict.

By DEFENDANT'S COUNSEL: Then I will move to direct a verdict.

The COURT: You move to dismiss the complaint. We may as well have it that way. The motion is denied.

Defendant's counsel excepts.

The COURT: You now move to direct a verdict.

By DEFENDANT'S COUNSEL: I want to state the grounds on which the verdict should be directed, and it is agreed by the other side that the grounds will be understood to be the same grounds on which I made the motion to dismiss the complaint.

I move to direct a verdict in favor of the defendant on the ground that the plaintiff's alleged copyright is invalid, because there was no notice of copyright, together with the year, and the person by whom the copyright was taken, upon the copyrighted painting, inscribed thereon, or upon the substance upon which the same was mounted.

On the ground that the painting was published without that notice and the picture was publicly exhibited without that notice upon it; the notice that I refer to being the notice required by the statute.

On the ground further that the plaintiff had no right to take out the copyright because he was neither the author, the inventor, the designer, or the proprietor of the painting, nor the assigns of the painting, in the sense of Section 4952.

94 On the further ground that there is no legal evidence to establish that any number of copies were found in the possession of the defendant, or that the defendant ever published the painting or any copies thereof.

On the further ground that this is a criminal action, being for the enforcement of a penalty, and that no intent to commit a criminal act has been proven.

On the ground that it has not been proved that the defendant either printed, published, dramatized, translated, imported, sold or exposed for sale, any copy, or printed, copied, published, imported or exposed for sale any copy of the alleged copyright painting.

The COURT: That motion is denied.

Defendant's counsel excepts.

By PLAINTIFF'S COUNSEL: I ask your Honor to direct a verdict that the jury find that there were found in the possession of the defendant by virtue of writs of replevin issued in this action, 993 copies in Buffalo and 203 copies in New York City, which were made

in infringement of the plaintiff's copyright, and that these copies be forfeited to the plaintiff—be declared the property of plaintiff.

By DEFENDANT'S COUNSEL: In view of that motion it makes it a question of law purely for your Honor's decision. There is nothing for the jury.

The COURT: Gentlemen of the Jury: I will say to you that this case, a very intricate case, presents simply the question as to whether these defendant's have violated the copyright law in publishing these copies of this painting; the theory of the defense being that
95 the copyright was not properly taken out, because the painting was publicly exhibited; and, furthermore, that you cannot sell a copyright and keep the picture; and for various other objections. They are very nice, delicate questions of law, and I regret that it has been necessary to detain you here to listen to this case, when it is to be taken away from you in this way; but there is only one way to settle those questions, and that is in the court of last resort. The questions are very proper for the Court of Appeals or the United States Supreme Court. In view of the consideration which the Court has given to these questions as they have come up here and to the same questions in other cases, I feel it to be my duty to direct you upon the law, as the Court understands it, to bring in a verdict in favor of the plaintiff; and I therefore direct you to enter a verdict for the plaintiff, and I allow the defendant an exception.

Verdict.

By direction of the Court the jury rendered a verdict in favor of the plaintiff.

Defendant's counsel moved to set aside the verdict and for a new trial on the ground that replevin, under the statutes of the State of New York, is not an appropriate remedy, or a lawful and legal remedy for taking possession of the alleged incriminating sheets or pictures, and that the proceedings taken in that behalf by the plaintiff were illegal and invalid, and that the plaintiff cannot avail of any benefit of that proceeding, and the introduction in evidence of that replevin proceedings was an error.

I move to set aside the verdict on the ground that it is against the evidence, that it is against the preponderance of evidence, and upon the grounds mentioned in my motion to direct a verdict for defendant, and on the various other grounds mentioned in Sec-
96 tion 999 of the Code of Civil Procedure, and on each of these grounds separately, and I move for a new trial on the exceptions.

The COURT: I deny that motion and allow you an exception and direct that judgment be entered.

On motion, a stay of sixty days was granted to the defendant.

The foregoing bill of exceptions contains all of the evidence and testimony in any way material to the exceptions sought to be reviewed.

And inasmuch as said matters produced and offered in evidence on

the trial, and the said exceptions so made to the rulings and decisions of the said Judge do appear upon the record of the said cause in the Circuit Court of the United States for the Southern District of New York, the defendant has prepared and caused to be settled this bill of exceptions as a record thereof in accordance with the statutes in such cases made and provided, and the Court hereby signs and orders this bill of exceptions to be filed this 18th day of April, in the year one thousand nine hundred and five.

WM. K. TOWNSEND, *Judge.*

We hereby consent to the settlement and filing of the above bill of exceptions.

Dated April 14th, 1905.

BRIESEN & KNAUTH,
Attorneys for Plaintiff.
WETMORE & JENNER,
Attorneys for Defendant.

97 PLAINTIFF'S EXHIBIT F.

Law Department,
W. W. Fuller, Counsel.
Junius Parker, Asst.

The American Tobacco Company, 111 Fifth Avenue.

NEW YORK, *June* 27, 1901.

Mr. L. H. Schutze, Manager The Berlin Photographic Company, 14 E. 23d Street, City.

DEAR SIR: I have taken up the matter about which you called on me yesterday, to wit, our infringement of your rights under your copyright of the picture "Chorus." I find by making inquiry of our Advertising Department that we did give an order to the American Lithographic Company for advertisement such as mentioned by you, but the American Lithographic Company has never furnished them, and they have never been distributed by us. Several samples have been furnished us from time to time, but our advertising Department assures me that there have not been any of these pictures put out by us in any way whatsoever. Lately, and before I saw you, this Company had rejected all that the American Lithographic Company had prepared, the rejection being on account of the fact that the mechanical execution was not as desired. At the time it made its contract to deliver us these pictures, the American Lithographic Company contracted and warranted that our distribution of them for advertising purposes in the United States would not infringe any adverse copyrights, or make us otherwise liable. I say this to you hoping
98 that I am thus doing you a favor, and also the American Lithographic Company. That company is a reputable company and evidently believes that it has the right to dispose of pictures such as it was about to dispose of to us.

It is unlikely that we will ever desire to make a distribution of this picture because of the rejection which I have already referred to. I have cautioned our Advertising Department, however, and there will certainly be no distribution until after I have conferred by letter or otherwise with you.

Thanking you for your courtesy in calling the matter to my attention, I am,

Yours truly,

(Signed) J. PARKER.

PLAINTIFF'S EXHIBIT H.

Old English Curved Cut Department,
The American Tobacco Company,
111 Fifth Avenue, New York.

JUNE 23, 1902.

STATEMENT OF
HERE'S TO OLD ENGLISH
HANGERS.

Printed, 25,000 lettered
5,000 unlettered
100 on satin.

NOW ON HAND AT
AMERICAN LITHOGRAPHIC COMPANY.

16,475 lettered
4,900 not lettered
87 on satin.

NOW ON HAND AT
DEUTHER MFG. CO.

1,010 lettered (for framing)

DISTRIBUTED TO DATE.

1,490 lettered (framed)
6,035 "
100 not lettered (now at this office)
13 on satin (now at this office).

99 PLAINTIFF'S EXHIBIT K.

United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

To the Marshal of the United States of the Western District of New York:

You are hereby requested to replevy the chattels described in the within affidavit at the place of business of the Deuther Manufacturing Company at Buffalo, N. Y.

Witness Hon. Melville W. Fuller, Chief Justice of the United States at the United States Court House in the City of New York, Southern District of New York, this 23d day of July, 1902.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

Allowed:

E. H. LACOMBE,
U. S. Circuit Judge.

BRIESEN & KNAUTH,
Attorneys for plaintiff, 49 *Wall Street, New York, N. Y.*

100 Circuit Court of the United States, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State and County of New York, ss:

Ludwig H. Schutze, being duly sworn, deposes and says:

First. That the above-named plaintiff is the owner of the chattels hereinafter particularly described, which are in the possession of the above-named defendant as hereinafter stated.

Second. That said plaintiff for many years prior to the year 1894 and ever since said year has lawfully done business under the name of Photographische Gesellschaft, at Berlin, Germany, and under the name of Berlin Photographic Company, in the United States of America.

Third. That shortly previous to the 2d day of April, 1894, one W. Dendy Sadler invented, designed and painted a certain painting, called "Chorus;" that said painting shows a group of smokers, sitting and standing around a punch bowl and holding pipes and
101 glasses in their hands and singing a song, and said painting by its artistic grouping and expression of the faces and its careful and skillful execution is a piece of art of very great merit and value.

Fourth. That on or about the 2d day of April, 1894, said W. Dendy Sadler, by an instrument in writing, executed on said day, assigned, transferred and sold to said plaintiff for a valuable consideration all his right, title and interest in any copyright obtainable thereon in the United States of America and all other countries, and the sole liberty and right of printing, reprinting, publishing, completing, copying, executing, finishing and vending said painting.

Fifth. That having acquired the right to obtain such copyright for such painting and being a subject of the Emperor of Germany and desiring to secure the copyright thereof under the laws of the United States of America respecting copyrights, and plaintiff before the publication thereof in this or any foreign country, to wit, on the 16th day of April, 1894, delivered to the Librarian of Congress at his

office, at Washington, District of Columbia, a description of said painting, to wit, "Chorus—W. Dendy Sadler, a company of gentlemen with filled glasses singing in chorus," and also a photograph thereof, and at the same time said plaintiff paid to said Librarian of Congress the sum of one dollar for recording said description, and thereupon said Librarian of Congress duly received the same and recorded said description of said painting on the 16th day of April, 1894, and duly rendered to said plaintiff a copy of said description and of said record under the seal of his office.

102 Sixth. That thereafter, on or about the 1st day of June, 1894, said plaintiff began the publication of said painting in this country and in foreign countries, and has ever since prepared and sold copies of said painting, made by photogravure process and otherwise.

Seventh. That by reason of the premises and the statutes, in such cases made and provided, there was secured to said plaintiff, his executors, administrators and assigns, or intended so to be, for the term of twenty-eight years from the said 16th day of April, 1894, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said painting, "Chorus."

Eighth. That said plaintiff has duly given notice of his copyright, as is required by law, by inscribing upon a visible portion of every copy of said painting published by him the word "Copyright," together with the year the copyright was entered and the name of the party by whom it was taken out, thus: "Copyright, 1894, by Photographische Gesellschaft."

Ninth. On information and belief that said defendant is in possession at the place of business of the Deuther Manufacturing Company, No. ——— ——, in the City of Buffalo, of one thousand and ten (1,010) sheets containing copies of said copyrighted painting, prepared in violation of plaintiff's copyright by some form of lithographic process, in colors, and which were made and sent to the Deuther Manufacturing Company at the direction and request of said American Lithographic Company, wrongfully and without the consent of said plaintiff, the proprietor of said copyright first obtained in writing, signed in the presence of two witnesses; that said unlawful printing of said copies in the possession of the

103 Deuther Manufacturing Company was done before the commencement of this action, and within one year previous thereto and during the existence of said copyright.

Tenth. That by virtue of the statutes of the United States every one of said one thousand and ten (1,010) copies of said painting in the possession of said defendant as aforesaid has become forfeited to the plaintiff, and is and they now are his property.

Eleventh. That the same are wrongfully detained by defendant.

Twelfth. That the alleged cause of the detention thereof, according to best knowledge, information and belief of deponent, is that defendant claims that plaintiff's copyright upon said painting "Chorus," is not valid, and said painting "Chorus," can be freely copied or caused to be copied by said defendant.

Thirteenth. That the said chattels have not been taken by virtue

of a warrant against the plaintiff for the collection of a tax, assessment or fine, issued in pursuance of a Statute of the State, or of the United States.

Fourteenth. That they have not been seized by virtue of an execution or warrant of attachment against the property of the plaintiff or of any person from or through whom the plaintiff has derived title to the chattels since the seizure thereof.

Fifteenth. That the actual value of said property, as deponent is informed and believes, is fifty dollars and fifty cents ($50.50).

Sixteenth. That deponent for eight and a half years past
104 has been and is now the agent for said plaintiff, residing at the City of New York, and has managed and conducted said plaintiff's business of selling copies of said copyrighted painting "Chorus" in the United States of America amongst others, and still continues so to do; that said plaintiff is a resident of the City of Berlin, Germany, and not at present in this country, and unable to make this affidavit; that suits have been instituted on behalf of the above-named plaintiff against the American Lithographic Company, and also against the above-named defendant for printing and publishing sheets containing copies of the painting "Chorus" herein complained of and to recover such copies; that a writ of replevin was issued in this action, under which 203 infringing copies of the painting "Chorus" were seized by the U. S. Marshal for the Southern District of New York; that at that time one of the officers of the defendant delivered to deponent a statement showing the number of copies of said infringing lithograph which had been ordered by said American Tobacco Company, and also in what manner some of the copies of said picture had been disposed of. Said statement contained the following item: "Now on hand at Deuther Manufacturing Company for framing 1,010 lettered;" that said Deuther Manufacturing Company is a manufacturer of frames at Buffalo, N. Y., and as deponent is informed and believes, said 1,010 copies are still in the possession of said Deuther Manufacturing Company; that deponent has seen said sheets containing copies of said copyrighted painting taken by the U. S. Marshal for the Southern District of New York in the above-entitled action, and that he is informed and believes that the sheets containing copies of said copyrighted painting now in the possession of the Deuther Manufacturing Company are in all respects like the copies heretofore taken from the American
105 Tobacco Company; that said copies are of a size of about 1¾ feet x 2¼ feet, and are in colors; that a half-tone copy of said painting "Chorus" made by plaintiff on a small scale for catalogue purposes is hereto annexed for identification, marked "Exhibit A;" that deponent is in possession of plaintiff's Certificate of Copyright for said painting "Chorus," and the sources of his information as to all matters stated hereinbefore to be alleged on information and belief and the grounds of his belief are correspondence with the officers of the American Tobacco Company and with the American Lithographic Company, and personal inquiries made by deponent.

LUDWIG H. SCHUTZE.

Sworn to before me, this 19th day of July, 1902.

[SEAL.] OTTO v. SCHRENK,
Notary Public, New York County.

(Exhibit "A" annexed. Copy of picture "Chorus.")

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister *vs.* American Tobacco Company.—Affidavit and Writ of Replevin.—Briesen & Knauth, Attys. for Plff., 49 Wall St., New York.—U. S. Circuit Court, Southern District of New York.—Filed Aug. 5, 1902.—John A. Shields, Clerk.—In pursuance of the within writ of replevin I have this 29th day of July, 1902, at Buffalo, N. Y., replevied at the place of the Deuther Manufacturing Company at Buffalo, N. Y., 993 pictures entitled "Chorus" as described in Exhibit "A" and now have the same in my possession and custody.—Wm. R. Compton, U. S. Marshal, W. Dist. of N. Y.—By Chas. F. Sturm, Deputy.—A Copy.—John A. Shields, Clerk.

106 United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER
against
AMERICAN TOBACCO COMPANY.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 20th day of June, in the year one thousand and nine hundred and two.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

BRIESEN & KNAUTH,
Plaintiff's Attorneys.

Office and Post Office Address, 49 Wall Street, Borough of Manhattan, New York City.

106*a* U. S. Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

Writ of Replevin, &c.

By virtue of the annexed affidavit and writ of replevin I did on Monday, the 23d day of June, 1902, replevy in the premises of the above-named defendant, American Tobacco Company, in Room 28, 3d floor, at No. 111 Fifth avenue, Borough of Manhattan, City of New York, in my district, the following property: Two hundred and three (203) pictures called "Chorus," of which seven (7) are hereto annexed, being a part of the property and chattels described in said affidavit and writ.

After diligent search the remainder of the property described in said affidavit could not be found.

I further return that at the same time and place I served without delay the annexed summons, writ of replevin, affidavit of Emil Werckmeister, dated June 20, 1902, and undertaking, together with a copy of exhibit hereto annexed marked "A," upon the above-named defendant, American Tobacco Company, by delivering true copies of each thereof to James B. Duke, president of said company, and at the same time exhibiting to him the within originals and the signatures thereon and leaving with him said copies thereof.

WILLIAM HENKEL,
U. S. Marshal, S. D., N. Y.

Dated New York, June 23d, 1902.

107 PLAINTIFF'S EXHIBIT L.

United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
against
AMERICAN TOBACCO COMPANY, Defendant.

To the Marshal of the United States for the Southern District of New York:

You are hereby requested to replevy the chattels described in the within affidavit.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, at the United States Court House, in the Borough of Manhattan, City of New York, Southern District of New York, this 20th day of June, 1902.

JOHN A. SHIELDS, *Clerk.*

Allowed.
GEO. B. ADAMS,
U. S. Circuit Judge.

BRIESEN & KNAUTH,
Attorneys for Plaintiff,
49 Wall Street, New York, N. Y.

108 United States Circuit Court, Southern District of New York.

Code of Civil Procedure, Sec. 3273.

EMIL WERCKMEISTER, Plaintiff,
against
AMERICAN TOBACCO COMPANY, Defendant.

Undertaking to Secure Costs Non-resident Plaintiff, &c.

Whereas, Emil Werckmeister, the above-named plaintiff, has commenced an action in the above-named Court against American Tobacco Company, the above-named defendant,

Now, therefore, we, Theodore Rogers, of Jamaica, Queens Borough, in the City of New York, and Edward C. Evans, of 221 West One Hundred and Twenty-ninth street in the City of New York, Borough of Manhattan, do hereby, pursuant to the statute in such case made and provided, jointly and severally undertake that we will pay, upon demand, to the defendant all costs which may be awarded to it in said action, not exceeding the sum of two hundred and fifty dollars.

Dated New York, June 20, 1902.

THEO. ROGERS.
EDWARD C. EVANS.

STATE AND COUNTY OF NEW YORK, *ss:*

Theodore Rogers, being sworn, says: That he is a resident of and a free holder within the State of New York, and worth double the sum specified in the above undertaking, over all the debts and
109 liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

THEO. ROGERS.

Sworn to before me this 20th day of June, 1902.
[SEAL.] OTTO v. SCHRENK,
Notary Public, N. Y. County.

STATE AND COUNTY OF NEW YORK, *ss:*

Edward C. Evans, being sworn, says: That he is a resident of and a freeholder within the State of New York, and worth double the sum specified in the above undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

EDWARD C. EVANS.

Sworn to before me this 20th day of June, 1902.
[SEAL.] OTTO v. SCHRENK,
Notary Public, N. Y. County.

STATE AND COUNTY OF NEW YORK, *ss:*

I certify that on this 20th day of June, 1902, before me appeared the within-named Theodore Rogers and Edward C. Evans, to me known and known to me to be the individuals described in and who executed the within undertaking, and they severally ackowledged to me that they executed the same for the uses and purposes therein mentioned.

[SEAL.] OTTO v. SCHRENK,
Notary Public, N. Y. County.

110 United States Circuit Court, Southern District of New York.

Code of Civil Procedure, Section 1699.

EMIL WERCKMEISTER, Complainant,
against
AMERICAN TOBACCO COMPANY, Defendant.

Undertaking of Plaintiff in Action to Recover a Chattel.

Whereas, Ludwig Schutze, resident agent of the plaintiff in this action, has made an affidavit that the defendant therein wrongfully detains certain chattels, in the said affidavit mentioned, of the value of one thousand and twenty-five 00/100 ($1,025.00) dollars, and the plaintiff claims the immediate delivery of such property to him, as provided for in chapter fourteen of the Code of Civil Procedure;

Now, therefore, in consideration of the taking of said property, or any part thereof, by the Marshal of the United States for the Southern District of New York, by virtue of the said affidavit and the requisition thereupon endorsed, we, the undersigned, Theodore Rogers of Jamaica, New York City, Queens Borough, State of New York, and Edward C. Evans, of No. 221 West One Hundred and Twenty-ninth street, in the City of New York, Borough of Manhattan, State of New York, do hereby, pursuant to the statute in such case made and provided, jointly and severally undertake and become bound to the defendant in the sum of two thousand and fifty
111 ($2,050.00) dollars, for the prosecution of the action by the plaintiff against the defendant, for the return of the said chattels to the defendant if possession thereof is adjudged to it, or if the action abates or is discontinued before the said chattels are returned to the said defendant, and for the payment to the defendant of any sum which the judgment awards to him against the plaintiff.

Dated N. Y., June 20, 1902.

THEO. ROGERS.
EDWARD C. EVANS.

STATE AND COUNTY OF NEW YORK, *ss:*

Theodore Rogers, one of the sureties named in and subscribers to the foregoing undertaking, being duly sworn, says that he is a resident of and a freeholder within the State, and is worth the sum of

four thousand one hundred ($4,100) dollars, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

THEO. ROGERS.

Sworn to before me this 20th day of June, 1902.
[SEAL.] OTTO v. SCHRENK,
Notary Public, N. Y. County.

STATE AND COUNTY OF NEW YORK, *ss:*

Edward C. Evans, one of the sureties named in and subscribers to the foregoing undertaking, being duly sworn, says: That he is a resident of and a freeholder within the State, and is worth
112 the sum of four thousand one hundred dollars over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

EDWARD C. EVANS.

Sworn to before me this 20th day of June, 1902.
[SEAL.] OTTO v. SCHRENK,
Notary Public, N. Y. County.

STATE AND COUNTY OF NEW YORK, *ss:*

I certify that on this 20th day of June, 1902, before me personally appeared Theodore Rogers and Edward C. Evans, to me known and known to me to be the individuals described in and who executed the within undertaking, and they thereupon severally acknowledged to me that they executed the same.

OTTO *v.* SCHRENK,
Notary Public, N. Y. County.

113 Circuit Court of the United States, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Ludwig H. Schutze, being duly sworn, says:

First. That the above-named plaintiff is the owner of the chattels hereinafter particularly described which are in the possession of the above-named defendant as hereinafter stated.

Second. That said plaintiff, for many years prior to the year 1894, and ever since said year, has lawfully done business under the name of Photographische Gesellschaft, at Berlin, Germany, and under the

name of Berlin Photographic Company, in the United States of America.

Third. That shortly previous to the 2d day of April, 1904, one W. Dendy Sadler invented, designed and painted a certain painting called "Chorus;" that said painting shows a group of smokers, sitting and standing around a punch bowl and holding pipes and glasses in their hands and singing a song, and said painting by its
114 artistic grouping and expression of the faces and its careful and skillful execution is a piece of art of very great merit and value.

Fourth. That on or about the 2d day of April, 1894, said W. Dendy Sadler, by an instrument in writing, executed on said day, assigned, transferred and sold to said plaintiff, for a valuable consideration, all his right, title and interest in any copyright obtainable thereon in the United States of America and in all other countries, and the sole liberty and right of printing, reprinting, publishing, completing, copying, executing, finishing and vending said painting.

Fifth. That having acquired the right to obtain such copyright for such painting and being a subject of the Emperor of Germany, and desiring to secure the copyright thereof under the laws of the United States of America, respecting copyrights, said plaintiff, before the publication thereof in this or any foreign country, to wit: on the 16th day of April, 1894, delivered to the Librarian of Congress, at his office, at Washington, District of Columbia, a description of said painting, to wit, "Chorus—W. Dendy Sadler—a company of gentlemen with filled glasses singing in chorus," and also a photograph thereof, and at the same time said plaintiff paid to said Librarian of Congress the sum of one dollar for recording said description, and thereupon said Librarian of Congress duly received the same and recorded said description of said painting on the 16th day of April, 1894, and duly rendered to said plaintiff a copy of said description and of said record under the seal of his office.

Sixth. That thereafter, on or about the 1st day of June,
115 1894, said plaintiff began the publication of said painting in this country and in foreign countries, and has ever since prepared and sold copies of said painting made by photogravure process and otherwise.

Seventh. That by reason of the premises and the statutes in such cases made and provided there was secured to said plaintiff, his executors, administrators and assigns, or intended so to be, for the term of twenty-eight years from the said 16th day of April, 1894 the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending, the said painting, "Chorus."

Eighth. That said plaintiff has duly given notice of his copyright, as is required by law by inscribing upon a visible portion of every copy of said painting published by him the word "Copyright," together with the year the copyright was entered and the name of the party by whom it was taken out, thus: "Copyright, 1894, by Photographische Gesellschaft."

Ninth. On information and belief, that said defendant is in possession, at its offices, No. 111 Fifth avenue, New York City, and at its

factory building in said city, of twenty-five thousand (25,000) copies of said copyrighted painting, prepared in violation of plaintiff's copyright, by some form of lithographic process, in colors, and which were made at said defendant's directions by the American Lithographic Company of New York City, wrongfully and without the consent of said plaintiff, the proprietor of said copyright first obtained in writing, signed in the presence of two witnesses, that said unlawful printing of said copies in defendant's possession was
116 done before the commencement of this action and within one year previous thereto and during the existence of said copyright.

Tenth. That by virtue of the Statutes of the United States every one of said twenty-five thousand copies of said painting in the possession of said defendant as aforesaid has become forfeited to the plaintiff and is and they now are his property.

Eleventh. That the same are wrongfully detained by defendant.

Twelfth. That the alleged cause of the detention thereof, according to the best knowledge, information and belief of deponent, is that the defendant claims that plaintiff's copyright upon said painting, "Chorus" is not valid and said painting "Chorus" can be freely copied or caused to be copied by said defendant.

Thirteenth. That said chattels have not been taken by virtue of a warrant against the plaintiff for the collection of a tax, assessment or fine, issued in pursuance of a statute of the State, or of the United States.

Fourteenth. That they have not been seized by virtue of an execution or warrant of attachment against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattels since the seizure thereof.

Fifteenth. That the actual value of said property, as deponent is informed and believes, is one thousand and twenty-five (1,025) dollars.

Sixteenth. That deponent for eight and a half years past has been and is now the agent for said plaintiff, residing at the City
117 of New York, and has managed and conducted said plaintiff's business of selling copies of said copyrighted painting "Chorus" in the United States of America, amongst others, and still continues so to do; that said plaintiff is a resident of the City of Berlin, Germany, and not at present in this country and unable to make this affidavit; that deponent a few months ago was informed by one of the officers of said defendant that said defendant intended to put upon the market for exhibition, in connection with defendant's goods, copies of said copyrighted painting, and within a week from the date hereof he has seen such copies made under the direction of defendant and exposed to view in public places; that said copies were of a size of about 1½ x 2 feet and in colors; that a half tone copy of said painting "Chorus" made by plaintiff on small scale for catalogue purposes is hereto annexed for identification, marked "Exhibit A;" that deponent is in possession of plaintiff's certificate of copyright for said painting "Chorus" and the sources of his information as to all matters stated hereinbefore to be alleged on information and belief,

Exhibit A.

Copyright, 1894, by Photographische Gesellschaft

and the grounds of his belief are correspondence with the defendant's officers and with the American Lithographic Company and personal inquiries of deponent.

LUDWIG H. SCHUTZE.

Sworn to before me this 20th day of June, 1902.

[SEAL.] OTTO v. SCHRENK,
Notary Public, N. Y. County.

(Here follows Exhibit A, marked p. 118.)

118 (Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, Pl'ff, *vs.* American Tobacco Company, Def't.—Bill of Exceptions.—Wetmore & Jenner, Sol'rs for Def't, 34 Pine St., N. Y.—Service of a copy of within proposed bill of exceptions and receipt of stenographer's minutes of trial, this 15th day of Febraary, 1905, is hereby admitted. Briesen & Knauth, Attorneys for Pl'ff.—U. S. Circuit Court, Southern District of New York.—Filed Apr. 18, 1905.—John A. Shields, Clerk.

119 Circuit Court of the United States for the Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
THE AMERICAN TOBACCO COMPANY, Defendant.

Assignments of Error.

The defendant makes the following assignments of error upon the trial of said case before the Hon. William K. Townsend, Circuit Judge, on the 22d day of November, 1904:

I. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to grant the defendant's motion that the complaint be dismissed upon the complaint and upon the plaintiff's opening on the ground that by said complaint and said opening it appeared that the plaintiff's copyright, mentioned in the complaint, was taken by him without any authority or right under Section 4952 of the United States Revised Statutes, in that the plaintiff was not the author, inventor, designer or proprietor of the painting alleged to have been copyrighted, or the executor, administrator or assign of any such person, and was merely a licensee of the artist of said painting, and, as such, had no right to take the alleged copyright, to which refusal of the Court to grant said motion the defendant duly excepted.

120 II. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to W. Dendy Sadler:

"R. D. Q. 3. If you answer 'yes' to the last question, please state what the rule or custom of the Royal Academy was with reference to allowing copies of the exhibited pictures to be made or taken at the exhibition."

The question was objected to by counsel for the defendant on the ground that the evidence to be elicited thereby was incompetent, irrelevant and immaterial, and the fact that the painting was not inscribed with the statutory notice is the important fact, and the reason why it was not inscribed is entirely immaterial, and that no custom, no privilege of copying could affect the question at all. The objection was overruled and thereupon defendant duly excepted.

"Ans. The rule of the Royal Academy, as long as I have known it, has been that copies of the exhibited pictures are not on any ac-

count to be made or taken at the annual exhibitions at the Royal Academy by the public or even by the artists themselves whose pictures are on exhibition, and not even a rough pencil sketch is allowed to be made by any one while the pictures are on exhibition."

III. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to said W. Dendy Sadler:

"R. D. Q. 4. Did you rely on the rule, if any, stated by you in answer to the foregoing interrogatory, when you delivered
121 your picture 'Chorus' to the Royal Academy for exhibition, as stated by you, or did you make any special arrangement or agreement with the Royal Academy with reference thereto? If so, please state what the arrangement was between you and the Royal Academy with reference to the right of the public, or visitors, of the Academy, or anybody, to copy said picture at and during the exhibition mentioned?"

The question was objected to by counsel for the defendant on the ground that the evidence to be elicited thereby was incompetent, irrelevant and immaterial, and the fact that the painting was not inscribed with the statutory notice is the important fact, and the reason why it was not inscribed is entirely immaterial, and that no custom, no privilege of copying could affect the question at all. The objection was overruled and thereupon defendant duly excepted.

"Ans. Yes, I did rely on the rule stated by me in answer to the foregoing interrogatory when I delivered my picture 'Chorus' to the Royal Academy for exhibition. I did not make a-y special arrangement or agreement either in writing or verbally with the Royal Academy with reference thereto. As a matter of fact, if any such arrangement or agreement had been suggested by me with reference thereto, it would not have been for a moment entertained by the Royal Academy. The rules are made by the Royal Academy independently of the exhibitors at the exhibition, and they cannot in any way be altered by special arrangement or agreement with the exhibitors. The said rules are all framed by the Royal
122 Academy in the interests of the general body of exhibitors, and there is an express rule of the Royal Academy that permission is not to be granted either to the public or visitors to the Royal Academy exhibitions to copy said pictures at and during the time of the annual exhibitions."

IV. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following questions propounded by the plaintiff to the witness Frederick Alexis Eaton:

"Q. 8. Please state whether the visitors at said exhibition of the Royal Academy in the year 1894 were allowed to make any copies of the pictures there exhibited. If yea, state under what circumstances such copying was allowed?"

The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"Ans. I answer this interrogatory absolutely in the negative."

V. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to the witness Frederick Alexis Eaton:

"Q. 9. Has the Royal Academy any rule with reference to permitting the copying of pictures at its annual exhibition, and if so, please state what the rule is and how long it has existed and been in force?"

123 The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"Ans. No, there is no such rule permitting copying; on the contrary, by Section 7, Clause 20, of the 'Abstract of the Constitution and Laws' of the Royal Academy of Arts, it is laid down that: 'No permission to copy works during the term of exhibition shall on any account be granted.' This rule has been in force ever since I had been secretary of the Royal Academy."

VI. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to the witness Frederick Alexis Eaton:

"Q. 13. State whether said rule, if any, was in force and enforced at the exhibition conducted by the Royal Academy during the year 1894 above mentioned?"

The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"Ans. Said rule was in force at the exhibition conducted by the Royal Academy during the year 1894, but whether there was any occasion to enforce it I do not know."

VII. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to the witness Frederick Alexis Eaton:

124

"Q. 15. Is it the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy to make any arrangement with the Royal Academy, its directors or officers, with reference to allowing the public to take copies of the pictures there exhibited? If so, please state what arrangement is made?"

The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"A. No; it is not the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy to make any arrangement with the Royal Academy, its directors or officers, with

reference to allowing the public to take copies of the pictures there exhibited."

VIII. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Otto von Schrenk:

"Q. What copies did you see?"

The question was objected to by counsel for defendant on the ground that the discovery then made and to which the witness was interrogated was pursuant to and in the execution of an illegal process. The objection was overruled and thereupon the defendant duly excepted.

125 "Ans. In the first place there were a number of copies hanging on the wall. They were exposed to view. They were framed and hanging in the office of the Curve Cut Department. They were in all respects like this picture, Exhibit G, so far as the photographs, the arrangement of figures, are concerned, but they differed slightly. One of them, as I understand, was an original oil painting; another was this same picture painted on silk. Exactly the same chromo, printed on silk."

IX. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to strike out from the answer of the witness Otto von Schrenk to a question propounded to him by plaintiff the following:

"We found altogether 203 copies."

Defendant's counsel moved to strike out the number that was found, on the grounds that the discovery then made and to which the witness was interrogated was pursuant to and in the execution of an illegal process, which motion was denied by the Court and the defendant then duly excepted.

X. That by the record aforesaid and the bill of exceptions it appears that the Court erred in receiving in evidence a press copy of a statement handed to the witness for the plaintiff, Otto von Schrenk, by a Mr. Wilson, which was offered in evidence by plaintiff's counsel and to which defendant objected on the grounds that the same was incompetent, irrelevant and immaterial and that Mr. Wilson had not been shown to have any authority or any knowledge on the subject-matter of the statement, and that the statement was

126 obtained from Mr. Wilson by the said Otto von Schrenk and the United States Marshal in the course of executing an illegal process. The objection was overruled and the paper was received in evidence and marked "Plaintiff's Exhibit H," and the defendant then duly excepted.

XI. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the plaintiff to read in evidence a stipulation setting forth the seizure by the Deputy Marshal at Buffalo on July 29, 1902, of certain alleged copies of said alleged copyrighted painting then in possession of the Deuther Manufacturing Company. To which offer the defendant objected on the ground that the process of replevin that was so executed by the Marshal in Buffalo was an invasion of defendant's constitutional right, was an unwarrantable search and an illegal act, and that nothing

done under it, or information obtained by virtue of it, could be used in evidence against defendant under the Fourth and Fifth Amendments of the United States Constitution. Said objection was overruled, to which the defendant duly excepted.

XII. That by the record aforesaid and the bill of exceptions it appears that the Court erred in receiving in evidence the proceedings had in the said Circuit Court of the United States for the Southern District of New York upon the execution of the writ of replevin issued July 1, 1902, to which offer the defendant objected on the ground that the said papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence in the case on account of their illegality. The objection was overruled, to which the defendant duly excepted.

127 XIII. That by the record aforesaid and the bill of exceptions it appears that the Court erred in receiving in evidence in connection with the proceedings had in said Court upon the execution of said writ of replevin issued July 21, 1902, the return of the Marshal endorsed thereon, to which the defendant objected that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence on account of their illegality, which objection was overruled and to which the defendant duly excepted, and the papers were received in evidence, marked "Exhibit K."

XIV. That by the record aforesaid and the bill of exceptions it appears that the Court erred in receiving in evidence the proceedings upon another replevin executed in the action on June 23, 1902, consisting of a writ of replevin, two bonds or undertakings, a summons, a direction to the Marshal, an affidavit and the return of the Marshal dated June 3, 1902, to which defendant objected on the ground that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence in the case on account of their illegality, which objection was overruled and the defendant duly excepted.

The papers were received and marked "Exhibit L."

XV. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to direct a verdict for the defendant, the defendant having moved at the conclusion of the plaintiff's evidence that the Court direct a verdict for the defend-

128 ant on the grounds that it had appeared in evidence that there was no notice of copyright, together with the year and the person by whom the copyright was taken, upon the copyrighted painting, inscribed thereon or upon the substance upon which the same was mounted, and on the ground that the said painting was published without that notice and that the picture was publicly exhibited without the notice required by the statute having been inscribed upon it or upon the substance upon which the same was mounted, and on the ground that the plaintiff had no right to take

out the copyright because he was neither the author, the inventor, the designer or the proprietor of the painting, nor the assigns of the author, the inventor, the designer or the proprietor of the painting, in the sense of Section 4952, and on the ground that there was no legal evidence to establish that any number of copies were found in the possession of the defendant or that the defendant ever published the painting, or any copies thereof, and on the ground that the action was a criminal action, being for the enforcement of a penalty and that no intent to commit a criminal act had been proven, and on the ground that it had not been proved that the defendant either printed, published, dramatized, translated, imported, sold or exposed for sale any copy of the alleged copyrighted painting, which motion was denied by the Court and to which ruling the defendant duly excepted.

XVI. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to set aside the verdict upon the defendant's motion to set aside the same and for a new trial, on the ground that replevin, under the statutes of the State of New
129 York, is not an appropriate remedy or a lawful and legal remedy for taking possession of the alleged incriminating sheets or pictures and that the proceedings taken in that behalf by the plaintiff were illegal and invalid and that the plaintiff could not avail of any benefit of that proceeding, and the introduction in evidence of the replevin proceedings was error, and also on the ground that the verdict was against the evidence, and on the ground that the plaintiff had not proved facts sufficient to constitute a cause of action, and on the grounds which had been enumerated in the defendant's motion that the Court direct a verdict in favor of the defendant, as set forth in the 15th assignment of errors, which motion was denied and the defendant then and there duly excepted.

THE AMERICAN TOBACCO COMPANY,
By WM. A. JENNER, *Counsel.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, Plaintiff, *vs.* American Tobacco Company, Defendant.—Assignments of Error.—Wetmore & Jenner, Att'ys for Defendant, 34 Pine St., New York.—U. S. Circuit Court, Southern District of New York.—Filed Feb. 15, 1905.—John A. Shields, Clerk.

130 United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
against
AMERICAN TOBACCO COMPANY, Defendant.

Know all men by these presents, that we, the American Bonding Company of Baltimore, a corporation duly organized under the laws of the State of Maryland, is held and firmly bound unto the above-named Emil Werckmeister in the sum of five hundred ($500) dollars, to be paid to the said Emil Werckmeister, for the payment of

which well and truly to be made it binds itself, its successors and assigns, firmly by these presents. Sealed with our seals and dated this 10th day of February, 1905.

Whereas, the American Tobacco Company has prosecuted a writ of error in the United States Circuit Court of Appeals for the Second Circuit to reverse the judgment rendered in the above-entitled suit by the Judge of the Circuit Court of the United States for the Southern District of New York on December 5th, 1904.

Now, therefore, the condition of this obligation is such that if the above-named American Tobacco Company shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void,
131 otherwise the same shall be and remain in full force and virtue.

Sealed and delivered and taken and acknowledged this 10th day of February, 1905, before me,

AMERICAN BONDING COMPANY
OF BALTIMORE,
By HEBER H. STRYKER,
[SEAL.] *Assistant Vice-President.*

Attest:
PAUL W. ARNOLD,
Resident Assistant Secretary.

CITY AND COUNTY OF NEW YORK, *State of New York, ss:*

On the 10th day of February, 1905, before me personally came Heber H. Stryker, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the Assistant-to-President of the American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided by law. And the said Heber H. Stryker further said that he was acquainted with Paul W. Arnold, and he knew him to be the Resident Assistant Secretary of said company; that the signature of said Paul W. Arnold subscribed to the within instrument is the genuine handwriting of the said Paul W.
132 Arnold and was subscribed thereto by like order of the Board of Directors, in the presence of him, the said Heber H. Stryker.

[SEAL.] D. C. MACKEY,
Notary Public, Kings County.

Certificate filed in New York Co.

Extracts from Charter of American Bonding Company of Baltimore.

"The said Company shall be and is hereby authorized and empowered to insure the fidelity of persons holding places of trust or responsibility to or under any State, County, City, Corporation, Company, person or persons, whatsoever; to become security for the faithful performance of any trust, office, duty, contract or agreement, and to supersede any judgment or to go upon any appeal or other bond."

* * * * * * *

That the directors shall * * * elect from their number * * * an Executive Committee."

"The Executive Committee so chosen * * * shall have power to elect non-resident local boards, non-resident local Vice-Presidents and non-resident local Assistant Secretaries * * * with power to sign and deliver bonds of suretyship and other obligations for and on behalf of and in the name of said Company to the same effect and with the same binding obligation as if the said instruments had been executed by the President or Vice-President and Secretary or Assistant Secretary."

* * * * * * *

"That the name of said body corporate is changed from 'The American Bonding and Trust Company of Baltimore City' to the 'American Bonding Company of Baltimore.'"

133 *Extracts from Charter of American Bonding Company of Baltimore.*

"That the Directors shall be elected annually by the Stockholders on the Second Monday in January in each year, and they shall elect from their number at the first meeting of the Board, a President, one or more Vice-Presidents, an Executive Committee, to be composed of five or more members of the Board, of which the President and Vice-Presidents shall be members *ex-officio;* said Directors shall also have power to elect a Secretary and a Treasurer (which offices may be held by one person), and shall also have power to elect one or more Assistant Secretaries and Assistant Treasurers (which offices may be held by one person), and to appoint and employ such other officers, clerks and agents as the business of said Company shall from time to time require."

Extract from the Minutes of the proceedings of the Board of Directors of the American Bonding Company of Baltimore, at the meeting held June 1st, 1896.

"Resolved, That the President or Vice-President is hereby authorized, empowered and directed to make and appoint such agents and to execute such powers of attorney to accept process for and on behalf of this Company, or to authorize the attorneys and agents to

execute bonds for and on behalf of this Company, as shall be needful, to the same extent and effect as though said appointments were severally made by separate action of the Board of Directors in each instance, and the Secretary or Assistant Secretary is hereby empowered and directed to authenticate such appointments, affixing the Corporate Seal of the Company to same."

* * * * * * *

134 Extract from the Minutes of the proceedings of the Board of Directors of the American Bonding Company of Baltimore, at the meeting held January 10th, 1905.

"Resolved, by the Board of Directors of the American Bonding Company of Baltimore, on this 10th day of January, 1905, that two persons be elected officers of the Company, to be known each as Assistant to President.

"It is further resolved, That both persons, or either of said persons, appointed or elected to be Assistant to President, shall on and from the date of said appointment or election, be authorized and empowered, on behalf of said American Bonding Company of Baltimore, to sign, execute, certify or endorse all bonds, undertakings, deeds, certificates, checks, drafts, debentures, contracts or other instruments or writings, except certificates of the stock of the said American Bonding Company of Baltimore, to the same effect and with the same binding obligation as though said bonds, undertakings, deeds, certificates, checks, drafts, debentures, contracts or other instruments or writings, had been signed, executed, certified or endorsed by the President or a Vice-President of the said American Bonding Company of Baltimore."

Election of officers for the ensuing year then being in order was proceeded with in due form, the following gentlemen being unanimously elected, by ballot: President, George Cator; First Vice-President, Charles A. Webb; Second Vice-President, Ernest Hoen, Jr.; Secretary, Edwin W. Poe; Treasurer, Wm. E. P. Duvall; Assistant to President, Heber H. Stryker; Assistant to President, George L. Radcliffe; Assistant Secretary, Charles R. Laurenson; Assistant Treasurer, F. Buchanan Owen.

135 Exract from Minutes of a meeting of the Executive Committee, held at the office of the Company at Baltimore, Maryland, on the nineteenth day of January, 1905.

Mr. Charles A. Webb presented the following resolution, seconded by Mr. James S. Woodside:

Preamble.—Whereas, In virtue of a resolution dated the fourteenth day of November, 1904, Hulbert T. E. Beardsley and Edward B. Southworth, Jr., of the City of New York, New York, were declared elected or appointed Resident Vice-Presidents of said Company at New York City, New York, and Oscar E. Lerch, Wight V. Abbott and Jerome Pendergast, of the same place, were appointed or elected Resident Assistant Secretaries, and the aforesaid officers were authorized to execute on behalf of said Company bonds and under-

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takings for its business and in accordance with its charter; now, therefore,

Be it resolved, that said appointments or elections of said persons, for reason, are hereby declared null and void, and all powers granted under said resolution are hereby revoked.

And be it further resolved, that there is hereby elected or appointed as Resident Assistant Secretaries of this Company at New York City, New York, Paul W. Arnold and Wight V. Abbott, and there is hereby vested in said Paul W. Arnold and Wight V. Abbott, and in each of them, full right, power and authority to attest as Assistant Secretary of said Company any and all bonds and undertakings for or on behalf the said Company, as surety, and which said bonds or undertakings shall be signed by Heber H. Stryker as Assistant-to-President.

And on motion, a majority of the whole Committee having voted in the affirmative, the said resolution was duly adopted.

136 *Certificate.*

I, Paul W. Arnold, Assistant Secretary of the American Bonding Company of Baltimore, hereby certify that the foregoing are true and correct copies taken from the records of the American Bonding Company of Baltimore.

In witness whereof, I have hereunto subscribed my name and affixed the Corporate Seal of the American Bonding Company of Balimore, at New York, N. Y., this 10th day of February, A. D. 1905.

[SEAL.] PAUL W. ARNOLD,
Resident Assistant Secretary.

Statement of Financial Condition American Bonding Company of Baltimore at the Close of Business, December 31st, 1904.

Assets.

Stocks and Bonds (market value)	$1,317,093.18
Outstanding Premiums, less commissions	80,588.30
Accounts, Receivable, secured	22,470.21
Interest Accrued	6,005.59
Real Estate	26,110.37
Mortgage Loans	38,815.34
Call Loans	16,811.88
Cash in Office and Depositaries	221,505.02
	$1,729,399.89

Liabilities.

Capital Stock	$500,000.00
Collateral Deposits	113,887.95
Special Time Deposit (due Jan. 1, 1927)	200,000.00

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Losses in Process of Adjustment	65,325.71
Losses Reported, but proofs not received	3,914.31
Special Reserve	113,622.44
Legal Reserve	322,092.37
Surplus and Undivided Profits	410,557.11
[SEAL.]	$1,729,399.89

137 CITY AND COUNTY OF NEW YORK, *State of New York, ss:*

I, Heber H. Stryker, Assistant-to-President of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the Assets and Liabilities of the said Company at the close of business December 31st, 1904.

In testimony whereof, I have hereunto set my hand and affix the seal of the Company this 10th day of February, 1905.

[SEAL.] HEBER H. STRYKER,
Assistant to President.

Sworn to and subscribed before me this 10th day of February, 1905.

[SEAL.] D. C. MACKEY,
Notary Public, Kings County.

Certificate filed in New York Co.

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, Plaintiff, against American Tobacco Company, Defendant.—Bond for Damages and Costs.—Wetmore & Jenner, Defts. Attys.—Ap-roved as to form and also as to sufficiency of sureties, with reservation, however, to the Deft. in Error of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District of New York.—Filed Feb. 15, 1905.—John A. Shields, Clerk.

138 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Emil Werckmeister, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 13th day of March, 1905, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein American Tobacco Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 15th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of these United States the one hundred and twenty-ninth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—American Tobacco Company, Plaintiff in Error, *vs.* Emil Werckmeister, Defendant in Error.—Orig. Citation.—Service of a copy of within citation this 16th day of February, 1905, is hereby admitted.—Briesen & Knauth, Attorneys for Defendant in Error.—U. S. Circuit Court, Southern District New York.—Filed Feb. 24, 1905.—John A. Shields, Clerk.

139 United States Circuit Court of Appeals for the Second Circuit.

No. 105, October Term, 1905.

Argued March 1, 1906; Decided April 4, 1906.

THE AMERICAN TOBACCO COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Lacombe and Coxe.

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendant in error who was plaintiff below. The court adjudged that "plaintiff have and retain and is entitled to the possession of 1196 sheets each containing copy of plaintiff's copyrighted picture *Chorus* found in the possession of defendant and replevined by the U. S. Marshal, said sheets having been made in violation of plaintiff's copyright, and that the same are forfeited to the plaintiff and are of the value of $1010," and awarding judgment for costs.

Mr. Sadler, an English artist, painted the picture and on April 2, 1894, delivered to the plaintiff, a German citizen, the following paper, "I hereby transfer the copyright in my picture *Chorus* to the Photographische Gesellschaft, Berlin for the sum of £200." Prior to that he had loaned the picture to plaintiff (who is the Photographische Gesellschaft) for the purpose of preparing a photogravure thereof. Upon the return of the painting, it was exhibited without notice of copyright in the Exhibition of the Royal Academy,
140 London, May to August 1894. We have held that such exhibition was not a publication, because the rules and practice

of the Academy prohibited the making of any copies of pictures there exhibited. Werckmeister *v.* Am. Lith. Co. (134 F. R. 321). On April 16, 1894 plaintiff took out a copyright in this country and began the publication of the painting in this country and in foreign countries by the sale of photographic or photogravure copies thereof. Sadler retained possession of the painting until October 1899 when he sold it to a Mr. Cotterell residing in London and at the time of the taking of testimony in this cause it was hanging in his dining-room. Sadler told Cotterell before effecting the sale of the painting that he had already sold the copyright to the Berlin Company, but at no time, so far as the evidence shows, was there inscribed upon some visible portion of the painting, or on the substance upon which it was mounted, or on the frame thereof any notice of copyright.

Per Curiam.—It is contended that plaintiff had no legal right to take a copyright; that he was not within the meaning of Section 4952 an "assign" of the author, and that no one but the author or proprietor of the original painting is entitled to take a copyright. This point has been fully discussed by Judge Putnam in Werckmeister *v.* Pierce & Bushnell Co. (63 F. R. 455) and by Judge Holt in Werckmeister *v.* Am. Lithographic Co. (— F. R. —). We concur in their conclusions and are of the opinion that plaintiff secured a statutory copyright. It is next contended that plaintiff has no right to maintain the action because of omission to give the notice of copyright prescribed by Section 4962 of the original painting or its mount. That point also is discussed in the cases last-above cited and we concur in the conclusions therein expressed, although a majority of the Circuit Court of Appeals in the first circuit reached a different conclusion (Werckmeister *v.* Pierce & Bushnell, 72 F. R. 52.)

It is next contended that this action cannot be maintained because plaintiff did not have the right of property or possession before
141 commencing the action. This is on the theory that the proceeding is an ordinary action of replevin under the New York Code. It is, however, a direct proceeding to secure condemnation and forfeiture of the goods, as the complaint and judgment shows. It is the "action in the nature of replevin for seizure of plates and copies," which is referred to in Bolles *v.* Outing Co. (175 U. S. 266); although the penalty for each copy seized or found in defendant's possession is not included in the same action, as this court intimated that it might be. Bolles *v.* Outing Co. (77 F. R. 966). The marshal seizes them to await the judgment of the court, under a writ which is most analogous to a writ of replevin, but which the Circuit Court issues not solely under Section 914, but under the broad grant of power in Section 716. There have been a great number of decisions upon this vexed question as to how the relief accorded by Sec. 4965 shall be secured; and they are not altogether harmonious. It will not be profitable to discuss them. The question can be decided only by the Supreme Court and even if we were of the opinion that the action and the writ were of more doubtful validity than we are inclined to attribute to them, it would seem to be the wiser course to affirm and thus secure a final determination of the question,

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since upon all the other propositions in the case we are satisfied that no error was committed by the trial court.

Other points raised: that defendant's constitutional rights have been invaded by execution of the writ, and that information procured under it could not be lawfully used against defendant under the Fourth and Fifth Amendments to the Constitution:—seem to be disposed of by the recent decision in Hale *v.* Henkel (U. S. Sup. Ct. Mch. 12, 1906).

The judgment is affirmed.

William A. Jenner, for the Plaintiff in Error.

Antonio Knauth, for the Defendant in Error.

142 United States Circuit Court of Appeals for the Second Circuit.

No. 1.

THE AMERICAN TOBACCO COMPANY, Plaintiff in Error.
vs.
EMIL WERCKMEISTER, Defendant in Error.

SIRS: Please take notice that on Monday, April 16th, 1906, at 10:30 A. M., or as soon thereafter as counsel can be heard, we shall present a proposed order for a mandate to this Court in the above entitled suit, a copy of which proposed order is herewith served upon you, for settlement. Dated New York, April 9, 1906.

Yours, etc.,
ANTONIO KNAUTH,
Of Counsel for Defendant in Error.

To William A. Jenner, of Counsel for Plaintiff in Error.

143 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 16th day of April one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Circuit Judges.

No. 1.

THE AMERICAN TOBACCO COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

An appeal having been taken by the plaintiff in error herein from a judgment of the Circuit Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

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On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

E. H. L.
A. C. C.

144 Endorsed: United States Circuit Court of Appeals, for the Second Circuit. The American Tobacco Co. *vs.* Emil Werckmeister. Order for Mandate and notice of settlement. Briesen & Knauth, solicitors for Defendant in Error. Antonio Knauth of counsel, 49 Wall Street, Borough of Manhattan, New York. Service of a copy of the within order and Notice is hereby admitted this 10th day of April, 1906. Wetmore & Jenner, of counsel for Pl'tff in Error. United States Circuit Court of Appeals Second Circuit. Filed Apr- 16, 1906. William Parkin, Clerk.

145 United States Circuit Court of Appeals for the Second Circuit.

AMERICAN TOBACCO COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Petition for Writ of Error and Supersedeas.

American Tobacco Company, plaintiff in error in the above entitled cause, feeling itself aggrieved by the order of this Court entered on the 16th day of April, 1906, comes now, by Wetmore & Jenner, its solicitors, and petitions said Court for an order allowing said plaintiff-in-error to prosecute a writ of error to the Honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff-in-error shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error, by the United States Supreme Court.

And your petitioner will ever pray.

AMERICAN TOBACCO COMPANY,
By WM. A. JENNER, *Counsel.*

146 At a stated term of the United States Circuit Court of Appeals, in and for the second circuit, held at the court rooms thereof in the Post Office Building in the Borough of Manhattan, City of New York, on the 17th day of April, 1906.

Present: Hon. E. Henry Lacombe, Judge.

AMERICAN TOBACCO COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Upon motion of Wetmore & Jenner, solicitors for plaintiff-in-error, and upon filing a petition for writ of error and an assignment of errors, it is—

Ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein on the 16th day of April, 1906, and that the amount of the bond on said writ of error be, and hereby is, fixed at $2,000.00, and that upon filing said bond all proceedings in that Court be suspended and stayed until the determination of said writ by the United States Supreme Court and the entry and service of an order thereon.

E. H. LACOMBE, *U. S. C. J.*

147 Endorsed: U. S. Circuit Court of Appeals, Second Circuit. American Tobacco Company, Plaintiff in Error, *vs.* Emil Werckmeister, Defendant in Error. Petition and Order for Writ of Error. Wetmore & Jenner, Sol'rs for Plaintiff in Error, 34 Pine St., New York. United States Circuit Court of Appeals, Second Circuit. Filed Apr- 17, 1906. William Parkin, Clerk.

148 United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN TOBACCO COMPANY, Plaintiff in Error,
against
EMIL WERCKMEISTER, Defendant in Error.

Know all men by these presents, That we, the American Tobacco Company, as principal, and the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana, and having an office and usual place of business at # 35 Nassau Street, Borough of Manhattan, City, and State of New York, as surety, are held and firmly bound unto the above named defendant, Emil Werckmeister, in the sum of Two thousand ($2,000.) Dollars, to be paid to the said Emil Werckmeister, *her* executors, administrators and assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 16th day of April, 1906.

Whereas the above-named The American Tobacco Company has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment of affirmance rendered in the above-entitled action by the United States Circuit Court of Appeals in and for the Second Circuit.

Now, therefore, the condition of this obligation is such that if the above-named The American Tobacco Company shall prose-
149 cute the said writ of error to effect and answer all damages and costs if it shall fail to make said plea good, then this ob-

ligation shall be void; otherwise, the same shall be and remain in full force and virtue.

Sealed and delivered this 17 day of April, 1906.

THE AMERICAN TOBACCO COMPANY,
By PERCIVAL S. HILL, *Vice President.*
FEDERAL UNION SURETY COMPANY,
By ROBERT M. NUGENT,
Res. Vice-President.

Attest:

F. STEARNS EDICK,
[L. S.] *Res. Assistant Secretary.*

STATE OF NEW YORK, *County of New York, ss:*

On the 17 day of April in the year 1906, before me personally came Percival S. Hill to me known, who being by me duly sworn did depose and say that he resides in New York City; that he is the Vice President of The American Tobacco Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

PERCIVAL S. HILL.

Subscribed and sworn to before me this 17th day of April 1906.
[SEAL.] M. S. FINCH,
Notary Public in and for N. Y. County and State.

My commission expires March 30, 1907.

150 *Form of Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK, *County of New York, ss:*

On this 16th day of April, one thousand nine hundred and six before me personally came Robert M. Nugent, known to me to be the Resident Vice-President of the Federal Union Surety Company, the corporation described in and which executed the annexed bond of The American Tobacco Company as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that said Federal Union Surety Company is duly and legally incorporated under the laws of the State of Indiana; that said Company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (Form —) of The American Tobacco Company is the corporate seal of said Company, and was thereto affixed by order and authority of the board of directors

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of said Company; and that he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with F. Stearns Edick and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said F. Stearns Edick subscribed to said bond is in the genuine handwriting of said F. Stearns Edick and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of Two hundred and fifty thousand dollars, Robert M. Nugent of New York is Attorney for service of process for the district in which this bond is given.

ROBERT M. NUGENT.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 16th day of April 1906.

CATHRYN F. ASPELL,
[L. S.] *Notary Public, New York County.*

Cert. filed in Kings, Queens, Suffolk, Richmond & Westchester Counties.

151 Endorsed: United States Circuit Court of Appeals for the Second Circuit. The American Tobacco Company, Plaintiff in Error, against Emil Werckmeister, Defendant in Error. Copy. Bond on Writ of Error. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 17, 1906. William Parkin, Clerk.

152 Supreme Court of the United States.

AMERICAN TOBACCO COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Assignment of Errors.

Afterwards, to-wit, on the 17th day of April, 1906, before the Justices of the Supreme Court of the United States at the Capitol in the City of Washington, comes the said American Tobacco Company, by Wetmore & Jenner its attorneys, and says that by the record proceedings aforesaid there is manifest error in the conclusion, determination and judgment of the Honorable Circuit Court of Appeals, made and entered herein on April 16th, 1906, in the following respects, to-wit:

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1st. Error in not determining that the trial court erred in refusing to grant the defendant's motion that the complaint be dismissed upon the complaint and upon the plaintiff's opening on the ground that by said complaint and said opening it appeared that the plaintiff's copyright, mentioned in the complaint, was taken by him without any authority or right under Section 4952 of the United States Revised Statutes, in that the plaintiff was not the author, inventor, designer or proprietor of the painting alleged to have been copyrighted, or the executor, administrator or assign of any such person, and was merely a licensee of the artist of said painting, and, as such, had no right to take the alleged copyright, to which refusal of the Court to grant said motion the defendant duly excepted.

153 2nd. Error in not determining that the trial court erred in permitting the following question propounded by the plaintiff to W. Dendy Sadler:

"R. D. Q. 3. If you answer 'yes' to the last question, please state what the rule or custom of the Royal Academy was with reference to allowing copies of the exhibited pictures to be made or taken at the exhibition."

The question was objected to by counsel for the defendant on the ground that the evidence to be elicited thereby was incompetent, irrelevant and immaterial, and the fact that the painting was not inscribed with the statutory notice is the important fact, and the reason why it was not inscribed is entirely immaterial, and that no custom, no privilege of copying could affect the question at all. The objection was overruled and thereupon defendant duly excepted.

"Ans. The rule of the Royal Academy, as long as I have known it, has been that copies of the exhibited pictures are not on any account to be made or taken at the annual exhibitions at the Royal Academy by the public or even by the artists themselves whose pictures are on exhibition, and not even a rough pencil sketch is allowed to be made by any one while the pictures are on exhibition."

3rd. Error in not determining that the trial court erred in permitting the following question propounded by the plaintiff to said W. Dendy Sadler:

"R. D. Q. 4. Did you rely on the rule, if any, stated by you in answer to the foregoing interrogatory, when you delivered your picture 'Chorus' to the Royal Academy for exhibition, as stated by you, or did you make any special arrangement or agreement with the Royal Academy with reference thereto? If so, please state what the arrangement was between you and the Royal Academy with reference to the right of the public, or visitors, of the Academy, or anybody, to copy said pictures at and during the exhibition mentioned?"

The question was objected to by counsel for the defendant on the ground that the evidence to be elicited thereby was incompe-
154 tent, irrelevant and immaterial, and the fact that the painting was not inscribed with the statutory notice is the important fact, and the reason why it was not inscribed is entirely immaterial, and that no custom, no privilege of copying could affect the

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question at all. The objection was overruled and thereupon defendant duly excepted.

"Ans. Yes, I did rely on the rule stated by me in answer to the foregoing interrogatory when I delivered my picture 'Chorus' to the Royal Academy for exhibition. I did not make any special arrangement or agreement either in writing or verbally with the Royal Academy with reference thereto. As a matter of fact, if any such arrangement or agreement had been suggested by me with reference thereto, it would not have been for a moment entertained by the Royal Academy. The rules are made by the Royal Academy independently of the exhibitors at the exhibition, and they cannot in any way be altered by special arrangement or agreement with the exhibitors. The said rules are all framed by the Royal Academy in the interests of the general body of exhibitors, and there is an express rule of the Royal Academy that permission is not to be granted either to the public or visitors to the Royal Academy exhibitions to copy said pictures at and during the time of the annual exhibitions."

4th. Error in not determining that the trial court erred in permitting the following questions propounded by the plaintiff to the witness Frederick Alexis Eaton:

"Q. 8. Please state whether the visitors at said exhibition of the Royal Academy in the year 1894 were allowed to make any copies of the pictures there exhibited. If yea, state under what circumstances such copying was allowed?"

The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"Ans. I answer this interrogatory absolutely in the negative."

155 5th. Error in not determining that the trial court erred in permitting the following question propounded by the plaintiff to the witness Frederick Alexis Eaton:

"Q. 9. Has the Royal Academy any rule with reference to permitting the copying of pictures at its annual exhibition, and if so, please state what the rule is and how long it has existed and been in force?"

The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"Ans. No, there is no such rule permitting copying; on the contrary, by Section 7, Clause 20, of the 'Abstract of the Constitution and Laws' of the Royal Academy of Arts, it is laid down that: 'No permission to copy works during the term of exhibition shall on any account be granted.' This rule has been in force ever since I have been secretary of the Royal Academy."

6th. Error in not determining that the trial court erred in permitting the following question propounded by the plaintiff to the witness Frederick Alexis Eaton:

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"Q. 13. State whether said rule, if any, was in force and enforced at the exhibition conducted by the Royal Academy during the year 1894 above mentioned?"

The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to eithe change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"Ans. Said rule was in force at the exhibition conducted by the Royal Academy during the year 1894, but whether there was any occasion to enforce it I do not know."

156 7th. Error in not determining that the trial court erred in permitting the following question propounded by the plaintiff to the witness Frederick Alexis Eaton:

"Q. 15. Is it the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy to make any arrangement with the Royal Academy, its directors or officers, with reference to allowing the public to take copies of the pictures there exhibited? If so, please state what arrangement is made?"

The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"A. No; it is not the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy, to make any arrangement with the Royal Academy, its directors or officers, with reference to allowing the public to take copies of the pictures there exhibited."

8th. Error in not determining that the trial court erred in permitting the following question propounded by the plaintiff to Otto von Schrenk:

"Q. What copies did you see?"

The question was objected to by counsel for defendant on the ground that the discovery then made and to which the witness was interrogated was pursuant to and in the execution of an illegal process. The objection was overruled and thereupon the defendant duly excepted.

"Ans. In the first place there were a number of copies hanging on the wall. They were exposed to view. They were framed and hanging in the office of the Curve Cut Department. They were in all respects like this picture, Exhibit G, so far as the photographs, the arrangement of figures, are concerned, but they differed slightly. One of them, as I understand, was an original oil painting; another was this same picture painted on silk. Exactly the same chromo, printed on silk."

157 9th. Error in not determining that the trial court erred in refusing to strike out from the answer of the witness Otto von Schrenk to a question propounded to him by plaintiff the following:

"We found altogether 203 copies."

Defendant's counsel moved to strike out the number that was

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found, on the grounds that the discovery then made and to which the witness was interrogated was pursuant to and in the execution of an illegal process, which motion was denied by the Court and the defendant then duly excepted.

10th. Error in not determining that the trial court erred in receiving in evidence a press copy of a statement handed to the witness for the plaintiff, Otto von Schrenk, by a Mr. Wilson, which was offered in evidence by plaintiff's counsel and to which the defendant objected on the grounds that the same was incompetent, irrelevant and immaterial and that Mr. Wilson had not been shown to have any authority or any knowledge on the subject-matter of the statement, and that the statement was obtained from Mr. Wilson by the said Otto von Schrenk and the United States Marshal in the course of executing an illegal process. The objection was overruled and the paper was received in evidence and marked "Plaintiff's Exhibit H," and the defendant then duly excepted.

11th. Error in not determining that the trial court erred in permitting the plaintiff to read in evidence a stipulation setting forth the seizure by the Deputy Marshal at Buffalo on July 29, 1902, of certain alleged copies of said alleged copyrighted painting then in possession of the Deuther Manufacturing Company. To which offer the
158 defendant objected on the ground that the process of replevin that was so executed by the Marshal in Buffalo was an invasion of defendant's constitutional right, was an unwarrantable search and an illegal act, and that nothing done under it, or information obtained by virtue of it, could be used in evidence against defendant under the Fourth and Fifth Amendments of the United States Constitution. The said objection was overruled, to which the defendant duly excepted.

12th. Error in not determining that the trial court erred in receiving in evidence the proceedings had in the said Circuit Court of the United States for the Southern District of New York upon the execution of the writ of replevin issued July 1, 1902, to which offer the defendant objected on the ground that the said papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence in the case on account of their illegality. The objection was overruled, to which the defendant duly excepted.

13th. Error in not determining that the trial court erred in receiving in evidence in connection with the proceedings had in said Court upon the execution of said writ of replevin issued July 21, 1902, the return of the Marshal endorsed thereon, to which the defendant objected that the papers constitute an illegal proceediug, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence on account of their illegality, which objection was overruled and to which the defendant duly excepted, and the papers were received in evidence, marked "Exhibit K."

159 14th. Error in not determining that the trial court erred in receiving in evidence the proceedings upon another re-

plevin executed in the action on June 23, 1902, consisting of a writ of replevin, two bonds or undertakings, a summons, a direction to the Marshal, an affidavit and the return of the Marshal dated June 3, 1902, to which defendant objected on the ground that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence in the case on account of their illegality, which objection was overruled and the defendant duly excepted.

The papers were received and marked "Exhibit L."

15th. Error in not determining that the trial court erred in refusing to direct a verdict for the defendant, the defendant having moved at the conclusion of the plaintiff's evidence that the Court direct a verdict for the defendant on the grounds that it had appeared in evidence that there was no notice of copyright, together with the year and the person by whom the copyright was taken, upon the copyrighted painting, inscribed thereon or upon the substance upon which the same was mounted, and on the ground that the said painting was published without that notice and the picture was publicly exhibited without the notice required by the statute having been inscribed upon it or upon the substance upon which the same was mounted, and on the ground that the plaintiff had no right to take out the copyright because he was neither the author, the inventor, the designer or the proprietor of the painting, nor the assigns of the author, the inventor, the designer or the proprietor of the painting,
in the sense of Section 4952, and on the ground that there was
160 no legal evidence to establish that any number of copies were found in the possession of the defendant or that the defendant ever published the painting, or any copies thereof, and on the ground that the action was a criminal action, being for the enforcement of a penalty and that no intent to commit a criminal act had been proven, and on the ground that it had not been proved that the defendant either printed, published, dramatized, translated, imported, sold or exposed for sale any copy of the alleged copyrighted painting, which motion was denied by the Court and to which ruling the defendant duly excepted.

16th. Error in not determining that the trial court erred in refusing to set aside the verdict upon the defendant's motion to set aside the same and for a new trial, on the ground that replevin, under the statutes of the State of New York, is not an appropriate remedy or a lawful and legal remedy for taking possession of the alleged incriminating sheets or pictures and that the proceedings taken in that behalf by the plaintiff were illegal and invalid and that the plaintiff could not avail of any benefit of that proceeding, and the introduction in evidence of the replevin proceedings was error, and also on the ground that the verdict was against the evidence, and on the ground that the plaintiff had not proved facts sufficient to constitute a cause of action, and on the grounds which had been enumerated in the defendant's motion that the Court direct a verdict in favor of

the defendant, as set forth in the 15th assignment of errors, which motion was denied and the defendant then and there duly excepted.

THE AMERICAN TOBACCO COMPANY,
By WILLIAM A. JENNER, *Counsel.*

161 Endorsed: Supreme Court of the United States. American Tobacco Company, Plaintiff-in-Error, *vs.* Emil Werckmeister, Defendant-in-Error. Assignment of errors. Wetmore & Jenner, Sol's for Pl'ff-in-Error, 34 Pine St., New York. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 17, 1906. William Parkin, Clerk.

162 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 161 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of American Tobacco Company, Pl'ff in Error, against Emil Werckmeister, Def't in Error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of April, in the year of our Lord One Thousand Nine Hundred and Six and of the Independence of the said United States the One Hundred and Thirtieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

163 By the Honorable E. Henry Lacombe, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to Emil Werckmeister, Greeting:

You are hereby cited and admonished to be and appear before a United States Supreme Court to be holden at the Capitol in the city of Washington on the 15th day of May, 1906, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of Appeals of the United States for the Second Circuit, wherein American Tobacco Company is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 17th day of April, in the year of our Lord one thousand nine hundred and six, and of the Independence of these United States the one hundred and thirtieth.

E. H. LACOMBE,
Judge of the Circuit Court of Appeals of the United States for the Second Circuit.

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164 [Endorsed:] 2381. U. S. Circuit Court of Appeals, Second Circuit. American Tobacco Company, Plaintiff-in-Error, *vs.* Emil Werckmeister, Defendant-in-Error.—Citation.—Wetmore & Jenner, Sol's for Pl'ff-in-Error, 34 Pine St., New York. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 18, 1906. William Parkin, Clerk. Service of copy of within citation this 18th day of April 1906 is hereby admitted. Briesen & Knauth, Att'ys for pl'ff in error.

165 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between American Tobacco Company, plaintiff in error, and Emil Werckmeister, defendant in error, a manifest error hath happened, to the great damage of the said American Tobacco Company, as is said and appears by its complaint: we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place before the Justices aforesaid on the 15th day of May, 1906, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of April,
166 in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and thirtieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the Circuit Court of Appeals of the United States of America for the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

167 [Endorsed:] 2381. Supreme Court of the United States. American Tobacco Co., Plaintiff in Error, *vs.* Emil Werckmeister, Defendant in Error. Writ of Error. Wetmore & Jenner, Solrs. for Plaintiff in Error, 34 Pine St., New York. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 18, 1906. William Parkin, Clerk. Service of copy of within writ of error this 18th day of April, 1906, is hereby admitted. Briesen & Knauth, Att'ys for Pl'ff in Error.

Endorsed on cover: File No. 20,246. U. S. circuit court appeals, 2d circuit. Term No. 287. American Tobacco Company, plaintiff in error, *vs.* Emil Werckmeister. Filed May 5th, 1906. File No. 20,246.

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CLERK.

Supreme Court of the United States.

AMERICAN TOBACCO COMPANY,
Plaintiff in Error,
(Defendant below),
vs.
EMIL WERCKMEISTER,
Defendant in Error,
(Plaintiff below).

28.

BRIEF FOR PLAINTIFF IN ERROR.

WM. A. JENNER,
Of Counsel for Plaintiff in Error,
34 PINE STREET,
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C. G. Burgoyne, Walker and Centre Streets, New York.

SE IN CENTER

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Supreme Court of the United States.

AMERICAN TOBACCO COMPANY,
Plaintiff-in-Error,
(Defendant below),

vs.

EMIL WERCKMEISTER,
Defendant-in-Error
(Plaintiff below).

No. 287.
October Term,
1906.

BRIEF FOR PLAINTIFF-IN-ERROR.

This is a writ of error sued out by the defendant below to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment in favor of plaintiff below entered on the verdict of a jury directed by the court in an action of Replevin prosecuted under the New York Code of Civil Procedure, and alleged by plaintiff below to be brought by virtue of Sec. 4965 of the United States Revised Statutes, which section is part of the act relating to copyrights and provides penalties for the infringement thereof.

The three main questions presented are:

1st. (*a*) In the case of the copyright of a painting, does Revised Statutes, Section 4962 require the notice of copyright to be inscribed on the original painting (or its mount)? Will a notice on photogravure copies suffice?

(*b*) Is a painting *published* when it is exhibited in a

gallery to which the public are invited, and is for sale there?

2d. Can a mere licensee of the artist take out a valid copyright, the licensee having no other interest or right?

3d. Can infringing copies of the painting be seized in Replevin Preceedings under the New York Code of Civil Procedure, and a valid judgment of forfeiture of the copies be obtained therein?

Statement of Facts.

The painting alleged to have been copyrighted was named "Chorus."

The painting was designed and painted by W. Dendy Sadler of England prior to April 2d, 1894.

In January, 1894, the painting being then unfinished, it was agreed between Sadler, the artist, and Werckmeister that the painting was to be finished by March 1st, and was then to be sent to Mr. Werckmeister to be photogravured, and was then to be returned to Mr. Sadler "in time for me (Sadler) to exhibit at the annual exhibition of the Royal Academy in 1894" (marg., p. 36). The oral bargain testified to by Mr. Sadler as occurring in January, 1894, was the same transaction as that testified to by Werckmeister as occurring in February, 1904 (marg., pp. 27, 32).

The painting was sent to Mr. Werckmeister at Berlin accordingly and was received by him March 8th, 1894, and was returned to Mr. Sadler in London on March 22d, 1894 (marg., pp. 27, 28).

On April 2d, 1894, Sadler executed and delivered the following instrument, "Exhibit B" (marg., p. 30):

"I hereby transfer the copyright in my picture "'Chorus' to the Photographische Gesellschaft, Ber-"lin (The Berlin Photographic Company), for the sum "of £200. London, April 2, 1894.

"(Signed) W. DENDY SADLER."

The plaintiff Werckmeister was a citizen of the German Empire and did business at the city of Berlin in Germany under the trade name of Photographische Gesellschaft and at the city of New York under the name of Berlin Photographic Company (marg., p. 5).

The said paper, Exhibit B, was executed by the artist Mr. Sadler on April 2, 1894 (marg., p. 37), at London, England, and was delivered to the plaintiff's London agent, who transmitted it to his Berlin firm (marg., p. 29).

On April 16th, 1894, the Photographische Gesellschaft of Berlin, by a letter dated at Berlin, March 31st, 1894, but received at the office of the Librarian of Congress on April 16th, 1894, deposited the title and description of the said painting and also a photograph of the same (see Plaintiff's Exhibits D and E, marg., pp. 67 to 69).

In the application (Exhibit D) the Photographische Gesellschaft was described, not as proprietors of the *painting*, but as "the proprietors of the *copyright*."

The painting having been returned to Mr. Sadler, it was exhibited by him at the exhibition of the Royal Academy in London in 1894 and "remained on exhibition for about three months." When exhibited it was framed and hung in one of the galleries so that visitors to the exhibition could see the same (marg., p. 39).

The exhibition of the Royal Academy occurred at its building in old Burlington House, Piccadilly, London (marg., p. 50), opening the first Monday of May and closing the first Monday of August, 1894 (marg., p. 51). The exhibition was open to the public on each week day, except the first day during the entire period, from 8 A. M. to 7 P. M., and the *public generally* were admitted to the exhibition on each week day on the payment of an admission fee of one shilling (marg., pp. 51 and 56), and during the last week the exhibition was open evenings, the charge being six pence.

There was a private view day for the press on May 2d for the whole day, and on May 3d up to one

o'clock, and the remainder of the latter day was for the Royal private view. There was also a general private view day on May 4th ; " no charge for admission was made on any of those days." The members and associate members of the Royal Academy and the artists exhibiting at the exhibition and their families were entitled at all times to free admission (marg., p. 56). Members and exhibitors and the wives and children of members came when they liked, and aggregated a large number. *The public generally visited the exhibition in large numbers on each of the days* (marg., p. 57).

During all the period of the exhibition there was not inscribed upon the painting or upon any visible portion thereof or on the substance on which the same was mounted or on the frame, the words " Copyrighted 1894 by W. Dendy Sadler," nor any words of like import, or importing that a copyright had been taken either by the artist or by any one else, in the year 1894 or in any other year (marg., pp. 39, 40).

During the entire time of the exhibition the artist, Mr. Sadler, was the owner of the painting (marg., p. 39).

While the painting was on exhibition at the Royal Academy *it was for sale*, " but with the copyright reserved " (marg., p. 42), which reservation was entered in the Gallery Sale Book (marg., p. 48).

The By-Laws of the Royal Academy, Section 7, clause 20 of the " Abstract of the Constitution and Laws," provided as follows :

" No permission to copy works during the term of the exhibition shall on any account be granted " (marg., p. 52).

The By-Law was adopted May 6, 1847, and the reason for it appears in a minute as follows :

" That so much property in copyright being entrusted to the guardianship of the Royal Academy, the council feel themselves compelled to disallow, in future, all copying within their walls from pictures sent for exhibition " (marg. p. 53).

There was "no publication of the rule to the public."

This rule was in force in 1894 (marg. p. 54), but Mr. Eaton, the secretary of the Royal Academy, was not aware of any occasion for its practical enforcement (marg. p. 54).

The photogravures of the painting were placed on sale and published by Werckmeister in June, 1894 (see Amd. Complt., marg. p. 6), or in the autumn of 1894 (see Werckmeister, marg. pp. 30, 31). These photogravures were inscribed with notice of copyright *(Ibid).*

Mr. Sadler afterwards, in October, 1899, sold the painting to a Mr. Cotterell residing in London, England (marg. p. 41), and in January, 1904, being the January prior to taking Mr. Sadler's deposition, it was hanging in Mr. Cotterell's dining room (marg. p. 42).

June 20th, 1902, the plaintiff Werckmeister commenced an action by the service of a summons against the American Tobacco Company, plaintiff-in-error (see summons, marg. p. 4 and marg. p. 106), and on the same day a writ of Replevin was issued out of the Circuit Court for the Southern District of New York directed to the Marshal of the same district, requesting him to replevin the chattels described in an annexed affidavit (see writ of replevin, marg. p. 107, and see affdt., marg. pp. 113–117).

Under the said writ the Marshal seized, upon the premises of the American Tobacco Company, 203 pictures (marg. p. 106*a*).

On July 23d, 1902, the plaintiff Werckmeister caused another writ of replevin to issue out of the same court, but directed to the Marshal of the Western District of New York, which writ was founded upon a similar affidavit, by which the Marshal was directed to replevy chattels at the place of business of the Deuther Manufacturing Co. at Buffalo, New York (see writ, marg. p. 99), and affdt., marg. pp. 101–105). Under

the latter writ the Marshal seized 996 pictures (marg. p. 105).

The amended complaint set forth the seizures by the respective Marshals of the said pictures (see marg. pp. 7, 8).

The copies thus seized were adjudged by the judgment in the case to be forfeited to the plaintiff, and to be of the value of one thousand and ten dollars (marg. pp. 17 and 18).

The Pleadings.

The amended complaint, after alleging the citizenship of plaintiff and incorporation of defendant (marg., p. 5), alleged (Third) that Sadler had painted the painting (describing it), and (Fourth) that Sadler on April 2, 1894, and before any publication of the painting, had assigned to plaintiff, " all his right, title and interest in any copyright obtainable thereon in the United States of America, and in all other countries," and (Fifth) that plaintiff thereon took proceedings to copyright said painting in the United States, and did copyright " said painting " on April 16, 1894, and (Sixth) that on or about June 1st, 1894, plaintiff " began the publication of said painting in this country and in foreign countries by the sale of copies thereof (marg., p. 6), and (Eighth) that plaintiff gave notice of the copyright " by inscribing upon a visible portion of *every copy* of said painting published by him the words " copyright 1894 by Photographische Gesellschaft " (marg., p. 7), and (Ninth) that defendant had in its possession at the commencement of the action 7,338 sheets, each a copy of said copyrighted painting, each in violation of the copyright, and that 203 of the copies so in defendant's possession were seized by the Marshal for the Southern District of New York under a writ of replevin and that 993 of said copies were seized by the Marshall for the Western District of New York under a

writ of replevin (marg., p. 7), and (Tenth) that every one of said copies "had become and will be forfeited to said plaintiff, and is and they now are his property" (marg., p. 8); (Eleventh) that the same were wrongfully detained by the defendant and demands judgment of delivery of said copies, etc. (marg., p. 8).

The answer (marg., pp. 10, 11) denied each and every of the allegations of the amended complaint, especially the allegations alleging forfeiture and detention, but admitted its incorporation and admitted that it had in its possession certain lithographed copies of a picture made for it by the American Lithographic Company, which the plaintiff claimed to infringe the alleged copyright, and admitted that 113 of said copies had been seized by the Marshall and carried away, and denied that the sheets in its possession had become forfeited to the plaintiff and denied the wrongful detention thereof.

The answer also affirmatively alleged (II.) that the plaintiff's alleged copyright was void for the reason that the plaintiff had no right under the statute to take the copyright because he was neither the author, inventor, designer or proprietor of the painting, nor the *assign* of the author, inventor, designer or proprietor, and had no right or authority under the statute to take the copyright (marg., pp. 11 and 12).

The answer also affirmatively alleged that the copyright was void and abandoned to the public, and the plaintiff had no right to maintain the action because the painting alleged to have been copyrighted was publicly exhibited by the author and proprietor at the Royal Academy exhibition from the first Monday of May, 1894, to the first Monday of August, 1894, and during said period was exhibited to the public and published, and there was at no time during the exhibition, nor before nor since, any notice of copyright inscribed upon some visible portion of the painting or on the substance on which the same was mounted as required by the statute, and that such exhibition and publication was with the knowledge, consent and per-

mission of the plaintiff and the said Sadler, the author and proprietor of the said painting (marg., p. 12).

The answer demanded judgment of dismissal of the complaint, the return of the copies seized by the Marshall, or their value, and for damages caused by the taking and detention.

Proceedings.

The action came on for trial at the Circuit Court before Hon. WM. K. TOWNSEND, C. J. and a jury. Evidence oral and documentary was produced by the plaintiff, no evidence being offered by the defendant, and by direction of the court the jury found a verdict in favor of the plaintiff below (marg., p. 17 and 18). Thereupon a judgment was entered that the plaintiff below was entitled to the possession of 1196 sheets, each containing a copy of plaintiff's copyrighted picture "found in the possession of the defendant and replevined by the United States Marshall, all as alleged in plaintiff's complaint, said sheets having been made in violation of plaintiff's copyright, and that the same were forfeited to the plaintiff and are of the value of $1,010, &c." (marg., p. 17 and 18).

Thereupon the defendant sued out a writ of error to the United States Circuit Court of Appeals (on a bill of exceptions which was heard by the latter court, and the judgment was there affirmed (see Opinion, marg., pp. 139 to 141).

The Errors Relied Upon.

Plaintiff-in-error (defendant below) relies upon the following alleged errors committed by the trial court and duly assigned as such.

FIRST. That the court erred "in refusing to grant "the defendant's motion that the complaint be dis- "missed upon the complaint and upon the plaintiff's "opening on the ground that by said complaint and "said opening it appeared that the plaintiff's copyright,

" mentioned in the complaint, was taken by him with-
" out any authority or right under Section 4952 of the
" United States Revised Statutes, in that the plaintiff
" was not the author, inventor, designer or proprietor
" of the painting alleged to have been copyrighted, or
" the executor, administrator or assign of any such

" person, and was merely a licensee of the artist of said
" painting, and, as such, had no right to take the al-
" leged copyright," to which refusal of the Court to grant said motion the defendant duly excepted.

See Assignment of Error I. in Circ. Court (marg., p. 119).

(See Assignment of Error 1st in Court below, marg., p. 152, and see defendant's motion to dismiss the complaint made on the complaint and on the plaintiff's opening stating the above grounds, page 12, and see the court's ruling thereon denying same stating reasons and defendant's exceptions, marg., pp. 22 and 23.)

The defendant at the close of the evidence at the trial also moved for a direction of a verdict in defendant's favor on the ground above stated, among other (see marg., p. 93), which motion was denied and defendant excepted.

The refusal of the court to direct a verdict for defendant

" on the ground that the plaintiff had no right to
" take out the copyright because he was neither the
" author, the inventor, the designer or the proprietor
" of the painting nor the *assigns* of the author, the in-
" ventor, the designer or the proprietor of the paint-
" ing in the sense of Section 4952 "

is assigned as Error in this Court. *Circ.*

See Assignment of Error XV. (marg., p. 128).

And was also assigned as error below by 15th Assignment (marg., p. 159 & 160).

Defendant, after the verdict, moved to set aside the same on the ground, among other, on which the motion to direct a verdict had been made, which motion was

denied, and to that ruling defendant excepted (see marg., p. 95 & 96) ; and that ruling is assigned as error below by Assignment XVI., as follows :

" that the court erred in refusing to set aside the " verdict upon the defendant's motion to set aside the " same and for a new trial—on the grounds which had " been enumerated in the defendant's motion that the " court direct a verdict in favor of the defendant as set " forth in the XV. assignment of error."

See Assignment of Error below XVI. (marg., p. 129),

and repeated in Court below by 16th Assignment of Error (marg., p. 160).

SECOND. That the court erred in refusing to direct a verdict for the defendant on the ground

" that it had appeared in evidence that there was " no notice of copyright together with the year and " person by whom the copyright was taken " upon the copyrighted painting inscribed thereon " or upon the substance upon which the same was " mounted and on the ground that the said painting was " published without that notice and that the picture " was publicly exhibited without the notice required " by the statute having been inscribed upon it or upon " the substance upon which the same was mounted."

See Assignment of Error XV. in Circ. Court (marg., p. 128),

and see 15th Assignment of Error in Court below (marg., p. 159).

At the close of the evidence the defendant had moved to direct a verdict for the defendant on the ground, among other, that the plaintiff's alleged copyright was invalid because of no notice of copyright on the copyrighted painting, and that the painting had been published without that notice and was publicly exhibited without that notice (see marg., p. 93), which motion was denied and defendant excepted.

The same matter of error is referred to in defendant's motion to set aside the verdict and for a new trial, which was denied with the defendant's exception

(marg., p. 95), and this error is part of the subject matter of Assignment XVI.

THIRD. That the court erred in permitting the following question propounded by the plaintiff to W. Dendy Sadler (marg., p. 120):

"Re-d. Q. 3. If you answer 'yes' to the last question, please state what the rule or custom of the Royal Academy was with reference to allowing copies of the exhibited pictures to be made or taken at the exhibition."

"The question was objected to by counsel for the defendant on the ground that the evidence to be elicited thereby was incompetent, irrelevant and immaterial, and the fact that the painting was not inscribed with the statutory notice is the important fact, and the reason why it was not inscribed is entirely immaterial, and that no custom, no privilege of copying could affect the question at all. The objection was overruled and thereupon defendant duly excepted.

"A. The rule of the Royal Academy, as long as I have known it, has been that copies of the exhibited pictures are not on any account to be made or taken at the annual exhibitions at the Royal Academy by the public or even by the artists themselves whose pictures are on exhibition, and not even a rough pencil sketch is allowed to be made by any one while the pictures are on exhibition."

See assignment of error II. (marg., p. 120), and 2d assignment of error (marg., p. 153), and see the record (marg., p. 44).

Assignment of error III. (marg., pp. 120, 121) refers to the same subject matter.

FOURTH. That the court erred in permitting the following question propounded by the plaintiff to the witness Frederick Alexis Eaton (marg., p. 122):

"Q. 8. Please state whether the visitors at said exhibition of the Royal Academy in the year 1894 were allowed to make any copies of the pictures there exhibited. If yea, state under what circumstances such copying was allowed?

"The question was objected to by counsel for the defendant on the ground that the same was incompetent, irrelevant and immaterial to either change the law or

to change the meaning of the statute or for any other purpose. The objection was overruled and thereupon the defendant duly excepted.

"Ans. I answer this interrogatory absolutely in the negative."

See Assignment of Error IV. in Circ. Court (marg., p. 122).

See also 4th assignment of error court below (marg., p. 154).

See also record (marg., p. 52).

Assignments of Error V. and VI. and VII. were of substantially the same import (marg., pp. 122 to 124) and see 5th, 6th and 7th assignments of error (marg., pp. 155-156).

And see record (marg., pp. 52 and 54).

FIFTH. That the court erred in refusing to set aside the verdict upon the defendant's motion to set aside the same and for a new trial on the ground

" that replevin under the statutes of the State of New " York is not an appropriate remedy or a lawful and " legal remedy for taking possession of the alleged " incriminating sheets or pictures and that the pro- " ceedings taken in that behalf by the plaintiff were " illegal and invalid and that the plaintiff could not " avail of any benefit of that proceeding and the in- " troduction in evidence of the replevin proceedings " was error."

See Assignment of Error XVI. in Circ. Court (marg., pp. 128, 129),

and see 16th Assignment of Error below (marg., p 160).

The defendant had moved after the verdict to set aside the verdict and for a new trial on the ground, among other, " that replevin under the statutes of the " State of New York is not an appropriate remedy or " a lawful and legal remedy for taking possession of " the alleged incriminating sheets or pictures, and that " the proceedings taken in that behalf by the plaintiff " were illegal and invalid, and that the plaintiff cannot " avail of any benefit of that proceeding, and the in- " troduction in evidence of that replevin proceeding

"was an error" (marg., p. 95), which motion was denied and defendant excepted.

SIXTH. That the court erred in permitting the plaintiff to read in evidence a stipulation (marg., p. 126)

"erred in permitting the plaintiff to read in evidence a stipulation setting forth the seizure by the Deputy Marshal at Buffalo on July 29, 1902, of certain alleged copies of said alleged copyrighted painting then in possession of the Deuther Manufacturing Company. To which offer the defendant objected on the ground that the process of replevin that was so executed by the Marshal in Buffalo was an invasion of defendant's constitutional right, was an unwarrantable search and an illegal act, and that nothing done under it, or information obtained by virtue of it, could be used in evidence against defendant under the Fourth and Fifth Amendments of the United States Constitution. Said objection was overruled, to which the defendant duly excepted."

See Assignment of Error XI. Circ. Court (marg., p. 126) and 11th Assignment of Error court below (marg., pp. 157–158).

See the stipulation, offer of same, defendant's objection, ruling and exception (marg., pp. 82 to 84).

SEVENTH. That the court erred in receiving in evidence the proceedings had in the said Circuit Court of the United States for the Southern District of New York (top p. 72)

"in receiving in evidence the proceedings had in the said Circuit Court of the United States for the Southern District of New York upon the execution of the writ of replevin issued July 1, 1902, to which offer the defendant objected on the ground that the said papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence in the case on account of their illegality. The objection was overruled, to which the defendant duly excepted."

See Assignment of Error XII. Circ. Court (marg. p. 126), and 12th Assignment of Error court below (marg., pp. 157–158).

And see record showing offer of the evidence, defendant's objection, the Court's ruling and defendant's exception (marg. p. 85), and see Exhibit L (marg. p. 107).

EIGHTH. That the Court erred in receiving in evidence in connection with the proceedings had in said Court (marg. p. 127)

"erred in receiving in evidence in connection with the proceedings had in said Court upon the execution of said writ of replevin issued July 21, 1902, the return of the Marshal endorsed thereon, to which the defendant objected that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and that the plaintiff could not avail of them as evidence on account of their illegality, which objection was overruled and to which the defendant duly excepted, and the papers were received in evidence marked 'Exhibit K.'"

See Assignment of Error XIII. Circ. Court (marg., p. 127).

See 13th Assignment of Error court below (marg., p. 158), and see record, offer, objection, ruling and exception (marg., p. 85).

FIRST POINT.

Plaintiff below (defendant in error) had no right to maintain the action because of omission to give the notice of copyright prescribed by Section 4962 on the original painting exhibited at the Royal Academy.

Assignments of Error II. (m., p. 120), III. (m., p. 120, 121), IV. (m., p. 122), V., VI. and VII. (m., p. 122 to 124) are included in this point.

If our contention under this point is sound, the above assignments should be sustained.

The facts most material to this point are (See statement, *ante* pp. 3 to 5):

1. The *painting* itself was copyrighted. The photogravure copy was *not* copyrighted.

2. After the copyright of the painting was taken, *viz.*, April 16, 1894, the painting was exhibited at the Royal Academy Exhibition for three months in 1894, viz.: from first Monday of May to first Monday of August, 1894, to which the public were invited and they attended in large numbers.

3. The painting was then and there for sale by its owner, Mr. Sadler.

4. That exhibition was with the knowledge and consent of the plaintiff Werckmeister, and of the artist Sadler.

5. There was at no time upon the painting or its mount the required statutory notice of copyright.

6. The complaint alleges and the fact was that the painting was *published* on or about June 1st, 1894, "by the sale of copies thereof".

See Am'd Compl't, clause Sixth, marg. p. 6.

7. There is proof that the photogravure copies were inscribed with the notice.

Three principal questions arise:

(1) Is the notice in case of a copyrighted painting required to be inscribed upon the original painting?

(2) Does exemption from giving the notice occur if the *original* painting is *not* published, but copies thereof are published?

(3) Is the exhibition of the painting to the public in a public gallery for several months, where all the world are invited to and may see it and the painting is for sale, a publication of the painting?

(4) Is it material, so far as the statutory requirement of notice is concerned, whether the original painting is published—made public—or not, copies thereof being published?

The questions stated in this point seem to be new in this court, but the following adjudications have occurred upon it.

In *Werckmeister vs. Pierce & Bushnell Mfg. Co.*, 63 Fed. Rep., 445 (Mass., 1894), the Circuit Court held (PUTNAM, C. J.), in the words of head note 4 that the notice "should not be inscribed on a copyrighted "painting, but on the photograph or other publica- "tions thereof," but the learned Judge observed (p. 456):

"There is something in the form of this notice which tends to sustain the contention of the defendant that it should have been inscribed on the painting itself, but not enough to overcome the force of the rules of construction which have led us to the result we have explained."

In that case the painting had been copyrighted and had been exhibited in a "public art gallery." No other publications were proven "except the photographs of the parties to this case" (Opinion, p. 446).

The judgment in that case was reversed on appeal by the Circuit Court of Appeals, *Pierce & Bushnell Mfg. Co. vs. Werckmeister*, 72 Fed. Rep., 54 (C. C. A., 1st Circ., 1896), which court held that Section 4962 requires the notice, in case of a painting and the like, to be inscribed upon "the individual copyrighted things whether one or many" and that, "to maintain an ac- "tion for the infringement of a copyright of a painting, "a notice must have been inscribed upon some visible "portion thereof, when it was published," and held

further that "*a painting which is publicly exhibited is* published" (WEBB, D. J., dissented).

In *Werckmeister vs. American Lithographic Co.*, 117 Fed. Rep., 360 (S. D. of N. Y., 1902) the Circuit Court (THOMAS, D. J.), on a motion for a preliminary injunction held in an action upon the copyright of "Chorus" here involved, that the exhibition of the painting at the Royal Academy was a publication thereof within the meaning of the statute, and refused the injunction.

In *Werckmesiter vs. American Lithographic Co.*, 126 Fed. Rep., 244 (S. D. of N. Y., 1903), which was the same suit as that before Judge THOMAS, the Circuit Court (WHEELER, D. J.) held on a plea alleging the prior publication of the original painting without being inscribed with the notice of copyright, that the plea was sufficient. The facts of publication at the Royal Academy in that case were substantially the same, the painting being the same, as in the case at bar.

On appeal, the Circuit Court of Appeals (1st Circ.) reversed the last mentioned judgment (see *Werckmeister vs. American Lithograph Co.*, 134 Fed. Rep., 321). That court held (Judge TOWNSEND writing the opinion) that an exhibition of an original copyrighted painting in a public gallery at which no person was entitled to copy the same and to which the public other than the members of the Academy were not admitted except on payment of a fee did not constitute such a publication as avoided copyright, and that such an exhibition was only a "limited publication" and not a "general publication." The court did not hold that the notice should not be incribed upon the painting itself, if the publication of the original painting should be a general publication.

In the case now at bar the Circuit Court at the trial and the Circuit Court of Appeals on its review, of course, followed ~~its~~ *the* decision stated in the American Lithographic Co. case last cited above

In *Werckmeister vs. American Lithgraphic Co. and American Tobacco Co.*, 142 Fed. Rep., 827, which was

a suit in equity on this same copyright against the defendants Lithographic Co. and Tobacco Co. for equitable relief, the Circuit Court (HOLT, D. J.) was concluded by the last mentioned decision of the Circuit Court of Appeals, and the opinion so states (p. 829). The learned Judge, however, stated (pp. 834–5) :

" Moreover, the requirement, in the case of paintings or statues, is one which would be so distasteful to many artists and purchasers that it seems to me improbable that Congress should have intended to require it. Most artists, and many purchasers, I think, would object to having a notice of copyright affixed to a beautiful painting or statue. Many persons would regard it as a serious blemish, particularly foreigners, by whom the object of the requirement would not be understood."

Other suits are pending between the parties of which one (Werckmeister vs. American Tobacco Co., an action for *penalties*), will be heard immediately following the present case, and another American Lithographic Co., plaintiff in Error, vs. Werckmeister, also an action for penalties, went to the Circuit Court of Appeals where it was reversed for errors, not involving the question now discussed (see *American Lithographic Co. vs. Werckmeister*, 146 Fed. Rep., 377).

It happens therefore that four judges have expressed views in accordance with that now urged by plaintiff in error upon the point that the original painting must be inscribed and that exhibition is publication. Three judges have expressed views that the original painting need not be inscribed, and two judges have expressed opposite views that exhibition is not publication.

In view of the foregoing contrariety of opinion we ask this Court to permit a somewhat extended discussion.

Foreign Artists Are on the Same Footing as Americans.

Prior to 1891, the privilege of copyright was limited by R. S. section 4952 to citizens of the United States and residents therein. By the Act of March 3d, 1891 (chap. 565, 26 Stat. at L., 1106) the words "Any citizen of the United States or resident therein, who shall be" were omitted from section 4952. The statute was thus summarily made international in scope. Most of the other sections were left unchanged, and its entire scheme was unaltered. The legislative intention manifestly was to place foreign authors (and artists) on exactly the same footing in all respects as our own citizens and residents, to require the same compliance, and to subject them to the same conditions. This plain intention must be kept in view, and if it is, arguments are excluded which are based on the foreigner's possible ignorance of our laws, on the customs of foreign artists and the rules of foreign galleries, the standards of foreign taste, and, to some extent, the adjudications of foreign courts.

Werckmeister, the licensee, and Sadler, the artist, must be regarded entirely as if they were residents of Washington, and the Royal Academy exhibition as if it was the Corcoran Gallery.

The Object of the Notice.

Section 4962, requiring notice of copyright, is quoted (*post*, p. 22).

The object of the notice is to notify the public—whoever sees the painting—that the rights of statutory copyright have supervened.

In *Burrow-Giles Litho. Co. vs. Sarony*, 111 U. S., 53, the Chief Justice, writing the opinion, said that the object of the statute requiring notice "is to give "notice of the copyright to the public by placing upon "each *copy*, in some visible shape, the name of the

" author, the existence of the claim of exclusive right " and the date at which this right was obtained " (p. " 55). This was said with reference to the copyright of a *photograph*, and in response to the appellant's allegation that the notice given was insufficient, because it specified only the initial letter " N " instead of the full christian name " Napoleon " of Mr. Sarony, who had taken out the copyright. The Court held that the designation of the author by the initial letter of his christian name in addition to his surname, was a sufficient compliance with the act.

The question now discussed was not considered at all, and no error had been assigned in respect to that question, and *that question could not have arisen*, because every photograph printed from a glass negative is as much of an original as any other, and by no proper use of language could a glass negative be regarded as a photograph, but only as a negative or plate for a photograph. The negative corresponds to the type from which a printed page is printed, and the photograph corresponds to the printed page itself. The case did not suggest the present question, and, therefore, it is fair to assume, that the word " copy " in the quotation above was used in the sense and with the meaning of " individual."

Section 4962, requiring notice, must therefore be construed conformably with its object, if possible.

Furthermore, it must be liberally construed in favor of the notice, because infringements of copyrights are, under Sec. 4965 penal in their nature and the consequences are severe as they involve both forfeitures and penalties.

Backus vs. Gould, 7 How., 798–811, construing the 6th section of the Act of February 3, 1831 (corresponding to Sec. 4965), in an action to recover penalties thereunder, held the section to be a penal one and to be construed strictly (p. 811).

In *Bolles vs. Outing Co.*, 175 U. S., 262–264 (1899), where the action was for the penalties, the Court said:

" This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the

plaintiff, irrespective of the damages actually sustained by him, or of the profits realized by the defendant; and in the further provision that one-half of the amount recovered shall be to the use of the United States. It makes no pretence of awarding damages and simply imposes a forfeiture of a specified sum."

Plainly, the statutory notice of copyright is most effectively given in the case of a painting when it is inscribed upon " some visible portion *thereof*, or of the substance on which the same shall be mounted."

Every one who sees the painting sees that notice, or can see it, if he looks.

Inscription upon a copy and not upon the original is futile, if one sees only the original and does not see the copy. To be completely effective the notice should be inscribed upon copies as well as upon the original.

But in the case of a painting, there may be no copies, replicas or reproductions, and the author or proprietor may wish only to prevent copying and to preserve the painting unique. In that case, unless the statutory notice is inscribed upon the painting or its mount, no notice at all would be given. But the statute does not distinguish between those cases where the copyrightable thing, *i. e.* the painting, is kept unique and those cases where copies or reproductions are made. The same language applies to both and in both cases there must be compliance with the same requirements.

In the case at bar the *thing* copyrighted was the *painting* painted by the artist Sadler, plaintiff's Exhibit D and E (marg., pp. 67 and 69). Plaintiff's photogravure or photograph was not copyrighted at all and was protected only by virtue of the copyright of the painting.

Should Section 4962 Be Construed so as to Promote Its Apparent Object, as Stated Above—i. e., to Require the Notice to Be Inscribed Upon the Original Painting?

The Circuit Court of Appeals (1st Circuit) held affirmatively in *Pierce & Bushnell vs. Werckmeister*, 72 Fed. Rep., 54. The Circuit Court of Appeals (2d Circuit) in *American Lithographic Co. et al. vs. Werckmeister*, 134 Fed. Rep., 321, did not deny it.

The answer to the question stated in the caption is the determination of the antecedent of the second "thereof" in Section 4962, Rev. St.

Section 4962 is as follows:

"That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by *inserting in the several copies of every edition published*, on the title-page or the page immediately following, *if it be a book*; or if a map, chart, musical composition, print, cut, engraving, photograph, *painting*, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by *inscribing upon* some visible portion *thereof*, or of the substance on which the same shall be mounted, the following words, viz.: "Entered," etc., "or at his option the word 'Copyright' together with the year" &c., thus 'Copyright, 18--, by A. B.'" *(Italics ours.)*

NOTE: The punctuation is that of the Amendatory Act of June 18, 1874 (18 Stat. at L., pp. 78, 79, and Supplement to R. S., Vol. 1, p. 15), which amended Section 4962 of the Revised Statutes as the same existed December 1st, 1873.

It seems to us that the plain import is that the copies of every edition of the book published is to have a notice *inserted in them*, but if it be a *painting*, then the notice is to be *inscribed upon* a visible portion of the painting or of its mount, without regard to publication.

We urge that the italicized "*thereof*" refers to "map, chart, painting," &c. The only alternative is that it refers to "several copies of every edition published."

Grammatically the second "*thereof*" refers to its nearest antecedent, *viz.*, map, chart, painting, etc., and the word "*same*" refers to the antecedent of the word "*thereof.*" While strict grammatical construction may not be entirely controlling, yet it is not to be disregarded. That is, the *letter* of the statute is to be regarded in ascertaining its *spirit.*

But this court said in *Lake County vs. Rollins*, 130 U. S., 662-670:

"To get at the thought or meaning expressed in a *statute*, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order *of grammatical arrangement* in which the framers of the instrument have placed them." (Italics ours.)

One canon of interpretation is that qualifying words and phrases should be confined to their next antecedent.

U. S. vs. Lacher, 134 U. S., 624.
Caha vs. U. S., 152 U. S., 214.

The semicolon occurring after "book" marks a division of the sentence into two somewhat independent parts and a degree of completeness of the thought may be looked for in the words preceding the semicolon and in the words following it.

Accordingly we find that in the words preceding the semicolon the *place* where the "notice" is to be given and on *what* it is to be given in the case of *a book* is fully expressed, but the *matter* of which the notice must consist is not specified in *that* part of the entire sentence. The subject matters of copyright following the semicolon are in their natures and mode of being enjoyed different from a book. The book is enjoyed by reading the printed copies. The map, chart, print,

cut, engraving and photograph, musical compositions *paintings*, drawings and statues, all possess the common feature that they are naturally capable of enjoyment when unique, and that is not true, practically speaking, of the manuscript of a book. It would be expected therefore that the *place* of the notice and on *what* the the notice should be given should be different in the case of such subjects.

A map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, and model or design have "visible portions" and all of them may be "mounted" on something. Inscribing the notice on the thing itself and inscribing it on the mount are made equivalents for each other. Now, if the true antecedent of the second "thereof" be the words "several copies of every edition published," then the true meaning of the act would be ascertained by substituting that antecedent for the word "thereof", and also for the word "same", without any other result than redundant expression. It would then read thus:

"if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary or model or design intended to be perfected and completed as work of the fine arts, by inscribing upon some visible portion of *the several copies of every edition published* or of the substance on which *the several copies of every edition published* shall be mounted the following words, etc."

An edition signifies a number of copies printed or published at the same time, each individual of which is like all the rest. It would seem to be fantastic to speak of an edition of a statue, statuary, painting or model or design intended to be perfected as a work of the fine arts. Therefore we cannot reasonably insert in place of the second "thereof" the assumed antecedent, and we are restricted to the natural and apparently grammatical antecedent, viz., map, chart, painting, etc.

Again it was said in Lake County vs. Rollins, *supra*, and applied to the construction of a statute,

"If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

If the antecedent of "thereof" be assumed to be the words "the several copies," then the words "of the map, chart, musical composition, etc." must also be assumed to follow the words "the several copies," otherwise "several copies" would be without meaning; that is, the antecedent is split so that part of it is found before the semicolon and part after it. That is to say, we must grope through the section and find the *disjecta membra* of the antecedent which will suit the particular purpose in hand.

But the spirit of the Act viewed in the light of its object forbids such straining efforts at interpretation.

A painting, statue, a model or design especially, and likewise a map, chart, cut, engraving in themselves give all the enjoyment of which they are capable by mere exhibition of them and a musical composition by performance. They may be sold and published by mere exhibition, but a book cannot be published, practically speaking, by mere exhibition of the manuscript. The exhibition of a painting may be the publication of that painting, but it is not a publication of an *edition* of the painting. If the object of inscribing notice is to give notice of the copyright, that notice is best given by inscribing the notice upon the painting itself, or its mount, and if the act does not require the notice to be so given, then the act does not require any notice to be given unless an edition is published, or, at least, unless copies are made. But why should the legislature have intended to make it unnecessary to give notice when a unique thing is published, but necessary when an edition or several copies are published?

The author of a painting upon its completion may

copyright it and thereby bring into existence an assignable and descendable property, *i. e.*, the statutory copyright. He may not make copies. He sells the painting without any notice of copyright on it. The purchaser copies it and perhaps buys it for that purpose and is sued by the owner of the copyright. We may also assume that the copyright owner has made and sold or published copies, but the purchaser of the original has never seen them or heard of them. The *statute* says that notice shall be given (and the *law* says that "this notice is to inform the public") but the purchaser of the customarily enjoyable vendible thing, the painting itself, has not received any notice. A verbal notice is not notice, nor is any notice of the copyright other than that derived from an *inscribed* notice conforming to the statute any notice at all.

Mifflin vs. White, 190 U. S., 264.

The buyer of the painting in such case would be the victim of a great injustice. The object of the requirement was to prevent such situations, and this is accomplished by construing the words of the statute according to their natural import, *i. e.*, to regard the word *thereof* as relating back to its grammatical antecedent, *viz.*, painting, &c.

But it may be objected that such a construction of the act does not provide for inscribing notice upon the *copies* of the copyrighted thing, and Judge PUTNAM so expressed himself in *Werckmeister vs. Pierce & Bushnell*, 63 Fed. Rep., page 452, as follows:

"If the defendant is right in this literal reading, it "follows that the statute is satisfied by inscribing the "notice on the original painting, or its mounting, and "that all reproductions thereof, whether in engravings, "photographs, or other forms, go free from the "notice."

That is not a legitimate deduction, because, as was said by Judge COLT, in the same case on appeal (72 Fed. Rep., p. 57):

"Section 4962 does not deal with 'copies' as dis-"tinct from 'originals,' or with 'originals' as distinct

" from 'copies,' as those terms are commonly under-
" stood; but it deals with published copyrighted
" things, and it declares that no action for infringe-
" ment will lie unless each copyrighted thing which is
" *published* or made public, be it a 'copy,' so called,
" or an 'original,' so called, or another edition or re-
" production of such copy or original, has inscribed
" upon it the notice of copyright."

Judge COLT'S view is a complete answer to Judge PUTNAM'S expressions, but we should except to Judge COLT'S phrasing in respect of his use of the word " published," contained in the above quotation, at least without some qualification, the reasons for and grounds of which were not presented to his mind in the argument of that case, or relevant to the question he was discussing. This criticism is based upon the following consideration: The act itself, in respect of other things than *books*, does not suggest *publication* as a determining factor in respect of the necessity of giving notice. But until either the original or some copy is published, piracy connot occur without a trespass upon the author's common law right of first publication. Upon the first publication of the original or a copy, the author's common law right of first publication is gone, and thenceforward he must rely upon such protection as the statute gives him.

Now to say that after publication of a *copy*, there remains a common law right of first publication of the *original* seems to be absurd. The common law right of first publication is the right to make the subject matter of the thing public. That subject matter is made public by the publication of a copy and, therefore, the *original* is published when a copy is made public or published. In this sense Judge COLT'S language is correct.

In the case in which Judge COLT wrote, the painting had been exhibited in a gallery without inscription of notice; the photographs were inscribed with notice. The holding was that the *painting* should have been inscribed.

Perhaps the better explanation of the legislative intent is the view that if the original is inscribed with notice, then a copy thereof would not be a copy in the sense of the statute, unless it also included the inscription.

Consideration of the Act of July 8, 1870, confirms the view here taken. That act (see Rev. Stat. of U. S., passed at the first session of the Forty-third Congress, 1873–74, page 967) reads as follows :

"No person shall maintain, etc., * * * if it be a "book ; or if a map, chart, musical composition, print, "cut, engraving, photograph, painting, drawing, chromo, "statue, statuary, or model or design intended to be "perfected and completed as a work of the fine arts, "by inscribing upon *some portion of the face or front "thereof*, or on the face of the substance on which the "same shall be mounted, etc." *(Italics ours.)*

The Act of June 18, 1874, above referred to, which is the act as it now stands (R. S., sec. 4962), changed the above phraseology to read as follows:

"by inscribing upon some *visible portion thereof* or of the substance on which the same shall be mounted."

The amendment of 1874 did not alter the sense, "visible portion" being the equivalent of "face or front," but its language directly points to "map, chart, painting, etc.," as the antecedent of "thereof."

A prior act may be regarded when necessary to construe doubtful language.

U. S. vs. Lacher, 134 U. S., 624–626.

Giving such effect, as is urged above, to the term "thereof," section 4962 requires the copyrighted painting or statue to be inscribed with notice, then it must be so inscribed whether that painting or statue is published or not.

If the painting or like article is ripe for copyright, it is ripe for inscription of the notice.

The statute requires the inserting of notice in

published things only in respect of published editions of *books*. The term "published" is not used in connection with paintings, statues and the like. There is a reason for that discrimination. A book is printed for the public. The manuscript as such is not so intended. A painting or statue, design or model is itself complete and capable in its nature of use by the public.

The model or design intended to be completed as a work of the fine arts would include a model for a statue or a sketch for a painting. There is no stage when they are not capable of being copyrighted. To secure the *exclusive* right to *complete* them, after publication, although the author himself intends to complete them, they must be inscribed with notice. Without notice, a person seeing the model or design might copy them and complete them by completing his copy.

The common manner of using all those different things must be considered in the interpretation of the statute.

When a copyright of the painting is taken, the copyright and the painting become separate properties. The painting itself may be sold before public exhibition thereof. The vendee of the painting, as the owner of it, may publish it in the completest manner of which it is capable. In such case, if no notice has been inscribed on the painting, such a publication would either prevent the owner of the copyright from maintaining an action, or the public would be misled by the lack of notice into supposing that copying was permissable.

It is true, the owner of the painting, if he sells it, or the owner of the copyright, may give oral or written notice, by advertisement or oral proclamation, of the copyright taken, but unless the notice is *inscribed*, and unless it is given by the copyright owner, it is not the notice required by the statute, and, therefore, is no notice at all.

Thompson vs. Hubbard, 131 U. S., 123.

Looking beyond the boundaries of this case, it is not expedient to establish a rule applicable to all cases,

whereby a painting which has been copyrighted may at any time, whether published or not, go uninscribed with the notice. If it is uninscribed, either the copyright owner may be prejudiced or the public may be deceived by a subsequent publication without the notice.

We think the section plainly, and without ambiguity, requires the original painting, which is copyrighted, to be inscribed with notice. If that is so, we think the Court may not import into or qualify the requirement by a condition that the painting need not be so inscribed if it remains unpublished. There is nothing in the language or the policy of the statute which authorizes that condition, and a refusal to recognize the natural obvious meaning is to change the law by judicial action.

As already said, if the painting is ripe for copyright, it is ripe for inscription of the notice.

Where the language is plain and unambiguous "a "refusal to recognize its natural, obvious meaning "would be justly regarded as indicating a purpose to "change the law by judicial action based upon some "supposed policy of Congress."

Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1–36.
Hadden vs. Collector, 5 Wall., 107–111.
Scott vs. Reid, 10 Pet., 524–527.
St. Paul &c. Ry. Co. vs. Phelps, 137 U. S., 528.

The primary rule is that a statute is to receive the meaning which the ordinary reading of its language warrants.

U. S. vs. Fisher, 2 Cranch., 386.
U. S. vs. Hartwell, 6 Wall., 395.
U. S. vs. Wiltberger, 5 Wheat., 95.

Thompson vs. Hubbard, 131 U. S., 123–150, held in respect of the copyright of a book

"This requirement of giving the prescribed notice "has always been held, under all of the statutes, to be

" one of *the conditions precedent to the perfection of the* " *copyright*, the other two being the deposit, before " publication, of the printed copy of the title, and the " depositing in the public office, within the prescribed " time after publication, of a copy or copies of the " book." (Italics ours).

Citing:

Wheaton vs. Peters, 8 Pet., 591.
Merrell vs. Tice, 104 U. S., 557.
Callaghan vs. Myers, 128 U. S., 617, 652.

If the notice is a condition precedent to perfecting the copyright, then the original should and may be inscribed when the copyright is taken, and when the original painting is in the control of the copyright taker.

The Exhibition at the Royal Academy Was a Publication of the Painting.

The painting " Chorus " was exhibited by the artist Sadler at the exhibition of the Royal Academy in London in 1894 and remained on exhibition for about three months (Sadler, x-Q. 4, marg. p. 39)—*i. e.*, from the first Monday of May to the first Monday of August (Eaton, x-Q. 3, marg. p. 56). The exhibition was open to the public (Eaton, Q. 7, marg. p. 51), and the public generally visited the said exhibition in large numbers on each of the public days (x-Q. 8, marg. p. 57). The picture during the exhibition was framed and " hung in one of the galleries of the exhibition so that visitors to the exhibition could see the same " (Sadler, x-Q. 5, marg. p. 39).

The only way in which a painting or statute, a model or design can be published is by exhibition thereof to the public. If the public were admitted without restriction of number, the exhibition was in every sense a public exhibition. Published means made public. The painting " Chorus " was made public for purposes of fame and sale. Sadler, the artist, was the owner of the painting during the exhibition (x-Q. 8, marg. p. 39). The painting was for sale (x-Q. 15, marg. p. 42). It was published as much as it would have been if exhib-

ited for sale in a shop window or in an auction room. No better or completerway of making an unique thing, like a painting, public or of finding a purchaser is conceivable.

The charge of a shilling entrance fee, six pence on some days (Eaton Q. 7, marg., Page. 51) did not make, as the exaction of a farthing would not have made, the exhibition less a publication of whatevever was exhibited, because every person in the world willing to pay the shilling or sixpence might and had the right to enter and view. A statue in the grounds of the Capitol would be a public exhibition of the statue, and hence a publication of it, although the exhibition would be restricted to persons orderly in behavior. The test of publicity is whether the public, *qua* public, may view. It is immaterial how many of the public attend the exhibition. The act of exhibiting is the act of the artist, and *its* quality cannot be dependent upon what the public may do under the privilege granted them.

A book is published—made public—when put on sale to the public, although only individuals who pay the dealer's price for it, can acquire it. A painting exhibited by the artist in his studio to his friends specially invited, although they paid no fee, would not be published because the exhibition would not be to the public but to a limited number of persons. Neither would an inspection by a chance visitor be a publication. This is mentioned because it was argued below by defendant in error that such an inspection would be a publication.

The fact that the painting might not, under the rules of the gallery, be copied in the gallery does not alter the fact of publication or its effect.

There was a By-Law of the Royal Academy which forbade copying in the gallery and probably any one

caught copying would have been reprimanded, and, if he persisted, put out (Eaton Qs 10–11, marg., page 53).

The Circuit Court of Appeals (2nd Circ) in *Werckmeister vs. American Lithographic Co.*, 134 Fed. Rep., 321, decided that case on the ground that no permission to copy works during the exhibition could be granted and the learned judge writing the opinion classified publications into " general publications " and " limited or restricted publications " (see Opinion p. 326). But the statute §4962 does not make that classification, nor mention *general* or *limited* or *restricted* publications.

The prohibition of copying in the gallery was a restriction upon *use* and it did not make the publication restricted, because the exhibition was not thereby less broad and complete, nor less to the public. The only circumstance which can restrict a publication is to restrict the public.

If there had been no restriction on copying, no larger public could have seen the painting; if copies had been made and freely distributed, no larger public could have seen the *painting*. The prohibition of copying simply prohibited a person from placing an easel in front of the painting and copying it or from snapping a camera upon it. It did not prevent a visitor from memorizing the picture and copying it in his own studio which would have been no great mental feat.

The By-Law of the Royal Academy is irrelevant to the question of whether or not the painting was published.

The By-Law forbade copying, because, according to the Minute, " so much property in copyright being entrusted to the guardianship of the Royal Academy " (marg., pp. 52, 53). Probably the British law does not require notice to be inscribed on the painting. It may or may not, there is no evidence about it, and evidence would have been immaterial; there is no presumption either way. Whatever the requirement of the British

law may have been, the Royal Academy could not have undertaken to *discriminate* between paintings copyrighted and those not so. It was its duty to prohibit the copying of copyrighted things. Therefore, it forbade *all* copying.

Whatever the British law may have been, the foreign artist Sadler and his licensee Werckmeister, seeking exclusive right in this country, were bound to comply with our statute law. The statute founds no distinction upon the nationality of the artist, or of the painting, or on the place of exhibition.

If the By-Law was material then the widest possible publicity and publication of a painting may be made, provided it is accompanied with some prohibition of copying.

Our statute says that prohibition *must* be by inscription of a notice on the painting or its mount; no other can be effective.

To say that an exhibition to the public would not be a publication, if there is a prohibition of copying in the gallery By-Law, must be tantamount to saying that such an exhibition to the public *would be* a publication if there was no such by-law. We submit that the *fact* of publication is not determinable by that condition. If the fact of publication can be determined by that condition, then the prohibition need not be expressed in a by-law, and it would be enough if it should exist unexpressed in the mind or intention of the exhibitor.

If a picture, by the artist's consent, is printed in a magazine accessible to all who wish to buy, it would be a publication, even if the artist or magazine proprietor or both had privately forbade the copying it, or even printed such a prohibition in connection with the picture. The supposed case is analogous to the Royal Academy Exhibition publication.

A publication in fact must be a publication in law. No wider publication of a painting can be made than by an exhibition which the public on invitation attends. That fact of publication cannot be totally changed in

character by some other fact which has no relation to it, which does not alter the publicity of the exhibition.

There can be no such thing as *restricted* publication, if publication receives its ordinary, indeed, universal meaning, which is—made public. As well speak of public privacy or hot cold. The Court below had no warrant for thus emasculating the term "publication." It was not necessary for an intelligent understanding of the section itself, or for reconciling it with any other provision of the Act, or for any other purpose which sometimes bends an ambiguous word a particular way. *Publication* is not ambiguous.

Exhibition of a painting "at such places as the Royal Academy" with the same restriction of copying was held by the Lord Chanceller in *Turner vs. Robinson* to be a publication (See *post*, p. 52).

Sadler after exhibiting the painting for four months in the Royal Adademy exhibition then sold it to Cotterell in whose dining room at last accounts it hung (Sadler, Re-d. Q. 9 and Re-x-Q. Marg., pp. 47 and 49). Suppose Sadler had sent or Cotterell should send the painting to a dealer's shop in London or here, who exhibits it for sale but does not allow copying in his shop, or suppose that the picture goes to an auction room in London or in New York where it is exhibited for sale but copying is not there allowed, it may be sold and bought and displayed in a bar room where copying is not allowed. Such exhibition may continue for many years. If "Chorus" was not published at the Royal Academy under the facts proved, it would not become published by any or all of these successive exhibitions.

In the opinion in *Werckmeister vs. Am. Litho. Co.*, 134 Fed. Rep., 321, the fundamental fallacy in the reasoning of the learned Judge is found, we think, in the following sentence (p. 326):

"A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of publication or its dedication to the public."

If this were true, then the test of publication would not be the extent of the publication, but must be in the circumstances from which an intent to abandon the right of copyright or a dedication to the public can be inferred. This seems to us, with due respect to the learned Judge, to be absurd. If there cannot be a publication unless there is abandonment of the right of copyright or dedication to the public (we assume them to have been used synonymously) then there could not be publication of a copyrighted book, which, by the fact of copyright, is not abandoned to the public. If the intent to abandon is material, then we must look to the author's or artist's intention, and here his private limitations would be material whether communicated to the public or not.

The learned Judge had also remarked before the quotation above made (see p. 324) :

" Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a ' general publication.' "

Here the learned Judge was right if by " dedication " he meant " communication." But he added " there may be also a ' limited publication '," and then said " A lim- " ited publication of a subject of copyright is one which " communicates a knowledge of its contents under con- " ditions expressly or impliedly precluding its dedica- " tion to the public." To justify this, citation is made to English authorities interpreting statutes utterly unlike our own. The distinction is not sound *Holmes vs. Hurst*, 174 U. S., 82, and *Mifflin vs. White*, 190 U. S., 260, were rightly decided, and in those cases there was communication to the public and thereby *dedication*, in fact, to the public by serial publication in a magazine, although the intention to abandon the right of copyright to the public did not exist. Our statute in respect of a *published edition* of a book regards the *fact* of communication to the public *qua* public, and does not discriminate between a " general "

and a "limited" publication. In respect of a *painting* publication is not a condition of the requirement of notice at all.

The fallacy above mentioned pervaded the opinion of the Circuit Court of Appeals throughout and led to the erroneous conclusions.

The Complainant Alleges Publication of the Painting.

In the case now at bar the complaint alleged (Marg., page 6)

"SIXTH. That thereafter, on or about the first day "of June, 1894, and not before, said plaintiff" (Werckmeister) "began the *publication* of said paint- "ing in this country and in foreign countries by the "sale of copies thereof".

and (Marg., page 7)

"EIGHTH. That said plaintiff has duly given notice of "his copyright as is required by law, by inscribing "upon a visible portion of every copy of said painting "published by him the word 'copyright'" &c.

In the case at bar, therefore, we have the fact established that the *painting* was *published.*

A painting cannot be published if it is not made public; if it is made public, it is published. The restriction upon copying the painting in the gallery was not greater than the restriction upon copying Werckmeister's photogravures of the painting.

The only logical test of publication is whether, by the voluntary act of the author (or artist) his production is exposed so that the public generally may acquire knowledge of it, and in the manner in which, according to its nature, it is adapted to exposition. Offering for sale only may not by itself be a publication, but exhibition to the public generally with offer for sale is highly evidential of the fact of publication. A logical test is not to be found in restrictions placed upon the *use* which the public may make of the publication.

The question as to what acts of an author or artist respecting his production is a publication thereof may arise in several ways. (1) In cases where the question is whether the right of *first* publication has been lost or not ; (2) in cases where the question is whether the right to maintain a suit on a statutory copyright has been affected by a publication previous to taking the copyright or afterwards by a publication without notice ; (3) in cases where the question is of the date when the statutory copyright term commences. This class of cases arises in England where the the term dates from the date of first publication, whereas in this country the term dates from the time of recording the title (Sec. 4953), and (4) where the question is of the date of publication, within ten days from which, formerly, and not later than the day of which, as Section 4956 now prescribes, two copies of the book, or a photograph of the painting, must be delivered at the Librarian's office.

However, the question may arise, acts which would constitute publication in one case would seem to constitute publication in the others.

Under the theory of "restricted publication" proposed by the courts below, the painting of the Sistine Madonna and other notable paintings exhibited in European galleries, for admission to which a small entrance fee is charged, have not been published, although hundreds of photographs and engravings of them have been made, and they are still copyrightable. Privilege of copying is not granted to every one; it is restricted to a few.

Common Law Copyright.

Before examining some of the illustrative cases, we desire to say a word about common-law copyright, because in the courts below some confusion arose arising out of omission to discriminate between the "rights of *first* publication" and statutory copyright. The confusion arises from applying the same term "copyright"

to two distinctly different rights, which arise from different sources.

Common-law copyright, if there ever was such a thing (which we deny), would be an exclusive right to multiply copies *after* publication, that is a right equivalent to statutory copyright but derivable from the common law.

There is no common-law copyright in this country and never has been. If there ever was, it has been superseded by the statute.

Holmes vs. Hurst, 174 U. S., foot page 85.

There is a right of first publication. That right consists in the common-law right of an author (or artist) to *first* publish his work, and that right is recognized by both American and English courts. That right is distinct from the *exclusive* right to multiply copies *after* publication, which is the essence of statutory copyright.

The right of *first* publication subsists until the author or artist first makes his work public. Until that time he may make copies for *his private use*, without losing his right of first publication, and until publication *he* may take statutory copyright.

When the right of *first* publication is gone, the *exclusive* right to multiply copies is gone, because the latter is purely statutory, and, being exclusive, cannot exist in respect of a matter which has been made public. While the author retains the right of first publication he may multiply copies without reference to the statutory notice, because he does not stand upon the statute in respect of his right of first publication, but the instant he makes his work public that instant he has no further right in the subject except as paper or canvas; none in the ideas or expression, because those can be monopolized only under the statute, and that which does not belong to him belongs to the public.

If the exhibition of "Chorus" at the Royal Academy in 1894 was not a publication of that painting within

Sec. 4962, then the *painting itself* (as distinguished from the photogravures) never has been published, and the right of *first* publication of that painting still subsists. So long as the right of first publication subsists, the right of the proprietor of that painting to copyright that painting has not been lost, Cotterell, the buyer of the painting, now has the right to copyright it in this country.

But the *painting* has been copyrighted by Werckmeister, and the complaint alleges that the painting was *published* by the sale of copies.

Thus a somewhat anomalous situation arises. The painting was published so far as concerns the sale of protected photogravure copies, but was not published so as to require inscription of notice. That is Werckmeister's contention.

Now, Section 4956 requires the applicant to deliver to the Librarian of Congress or mail to him a description of the painting "on or before the day of publication in this or any foreign country," and also a photograph of the same "not later than the day of publication thereof in this or any foreign country."

Is the requirement of Sec. 4956, respecting the filing of the *description* and the *photograph* of the painting, affected by such an exhibition as at the Royal Academy? If it is, then that exhibition was a publication within Sec. 4956 and also within Sec. 4962. If it is not, then the day of publication of the *painting* was the day of sale of photogravures. If neither the exhibition nor the sale of photogravures was a publication of the *painting*, then no publication has as yet occurred, and a valid copyright may yet be taken, by the proprietor of the painting.

Authorities.

Decisions of State Courts which have jurisdiction of questions involving right of *first publication* are as germane to the question of what is a publication as de-

cisions of Federal Courts which have exclusive jurisdiction of statutory copyright.

In *Jeweler's Mercantile Agency vs. Jeweler's Pub. Co.*, 155 N. Y., 241, the plaintiff collected information as to the business and credit of persons in the jewelry trade, printed such information twice a year in a "Reference Book" which was furnished to subscribers under a contract which designated the transaction as a "loan" of the volumes and provided that the information supplied should be confidential and should not be disclosed; that the title to the books should remain in the agency; that the books should be returned upon the expiration of the subscription, and that the agency might terminate the contract and take back the books, on returning the amount of unexpired subscriptions. The Court, in a thoroughly reasoned opinion by PARKER, Ch. J., a majority of the Court concurring in his reasons and conclusions, the other judges concurring in the result, but upon special grounds, held that

"the delivery of the book to the subscribers there-
"fore constituted a *publication*; that the common-law
"right of first publication was, therefore, gone and
"that, consequently, the plaintiff was not in a posi-
"tion to maintain the action."

"The leasing of a book for a year or a term of
"years, to any and all persons who will accept it on
"the author's terms, even if these include an agree-
"ment not to disclose its contents, constitutes a pub-
"lication."

"If a book be put within the reach of the general
"public, so that all may have access to it, no matter
"what limitations be put upon the use of it by the in-
"dividual subscriber or lessee, it is published, and
"what is known as the common-law copyright, or right
"of first publication is gone."

In *Callaghan vs. Myers*, 128 U. S., 617, it was held, quoting the head-note, but see opinion (p. 657):

"The delivery by the reporter, of copies of a volume
"of reports to the prescribed officer of a State, under
"a statute, for its use, accompanied by the payment

" of the reporter therefor, was a publication of the " book, so as to require the deposit of the work in the " clerk's office within three months after such publica- " tion, to make the copyright valid."

This was under the Act of 1831, which required the work to be deposited in the District Court Clerk's Office within three months after publication of the work.

In *Larrowe-Loisette vs. O'Loughlin*, 88 Fed. Rep., 896, it was held in the First Circuit that—

" The selling of copies of a book by the author to " all persons paying him for a course of instruction " connected therewith, during a number of years, con- " stitutes a publication which deprives him of the " right to subsequently obtain a copyright, *though each* " *purchaser was bound by contract not to communicate* " *the contents of the book to anyone else.*"

The case was decided on principle, as well as on the authority of the Jeweler's case, *supra.*

In *Holmes vs. Hurst*, 76 Fed. Rep., 757, it was held in the First Circuit that

" An author cannot acquire copyright of a liter- " ary work which has been published serially in a mag- " azine, under contract by which the publishers were " to have no other right to it, unless previous to " such publication he has taken the steps necessary to " secure a copyright."

This was on the ground that

" there is no qualification in the statute as to the " kind of publication, whether in whole at a time or " by piece-meal; what is published anyhow is gone " out of the author's reach."

In the same case on appeal, *Holmes us. Hurst*, 80 Fed. Rep., 514, the Circuit Court of Appeals said, affirming the decree, substantially on the opinion below, but meeting the argument of the complainant that the author had no " intention to abandon " by distinguishing from cases where an artist exhibits to friends

in a studio or an author submits a MS. to critics for suggestions and says:

"But where an author causes what he has written
"to be printed, and then allows it to be put publicly on
"sale, offering copies to whomever chooses to buy,
"and actually selling such copies by the thousand, it
"is idle to say that there has been no publication of
"what is thus printed and given to the world, because
"the author intended thereafter to combine what he
"has thus sold with other writings of his own, and
"then to apply for copyright on the combination."

In *Holmes vs. Hurst*, 174 U. S., 82, the argument of the appellant that the publication of the parts serially in a magazine was not a publication of all the parts together as a book, so as to invalidate the copyright of the latter, was met, and the fallacy exposed by saying that the distinction between the right to make copies of the several parts, and the right to combine them in a single volume appear to be shadowy.

Yet it cannot be denied that the publication of parts successively is, in respect of each part, a restricted publication of the whole.

In *Ladd vs. Oxnard*, 75 Fed. Rep., 703, it was held in Massachusetts that

"The issuance to subscribers, without count as to
"number, of a book of credit ratings and the financial
"standing of persons and firms engaged in a particular
"line of business, upon a stipulation that the same is
"merely *loaned* to the subscriber, and not sold, and
"that, if found in any other hands than those entitled
"to use it by permission of the publishers, the latter
"may take possession of it, and annul all rights of
"the subscriber, is a publication, sufficient to give the
"compilers a right to the protection of the copyright
"statutes, where they have taken the necessary steps
"to secure a copyright."

The foregoing cases show that, however the question may arise, the test of publication is whether the *public* have, by the author's consent, access to the subject. The test is not in any restriction which may be placed

on the public's *use* of the thing, nor in any *understanding* which may be imposed upon the public, by the author's conditions, nor in the fact that the public are required to pay for the privilege of access. The fact that the *public* are invited to read, to see, is enough.

In *Bartlett vs. Crittenden*, 4 McLean, 300, the question was of the common law right. Plaintiff was a teacher of bookkeeping and had written his system of instruction on separate cards for the convenience of teaching his pupils. He had permitted them to copy these cards for their own convenience and to enable them to instruct others. The defendant published copies of the cards, which he had obtained while a pupil in the school; and maintained that the plaintiff by permitting his manuscripts to be so copied had abandoned them to the public. The Court held this to be a private circulation of copies which did not prejudice the owner's common law rights, and that the students who made the copies had a right to them and their use only as originally intended, but no right to the use which was not in the contemplation of the complainant and of themselves when the consent was first given. "The lecturer designed to instruct his hearers, and not the public at large."

It will be observed that the case turned on the point, not merely that the use was limited, but that the public was limited, and because of the latter circumstance the circulation was private. It is doubtful if the public could rightly be considered limited, in view of the fact that the pupils might use the cards to instruct others, but the court regarded the circulation as private, and so observed the principle.

We omit comment upon the remark of Judge TOWNSEND in *Werckmeister vs. Springer Lith. Co.*, 63 Fed. Rep., 808–812, to the effect that exhibition in a gallery with prohibition of copying is not a publication. The question was not involved in the decision. The defendant did not claim the exhibition to be a publication and the matter was stated as a *semble*. If there

was no claim, it is probable that there was no discussion of the question, and if it was not necessary to decide it, it probably was not considered.

The rule derivable from the text writers may be stated thus :

To constitute a publication it is necessary that the work should be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying it.

Copinger on Copyright (3rd Ed.), p. 119.

" It is not necessary that the book be actually sold ; " it is sufficient if it be offered to the public. The act " of publication is the act of the author, and cannot be " dependent upon the act of the purchaser."

Per PARKER, Ch. J., in Jeweler's case *(supra)*, at p. 251, quoting from *Copinger*, p. 118.

" The distinction is in the limit of the circulation ; " if limited to friends and acquaintances it would not " be a publication, but if general, and not so limited, " it would be."

Copinger, p. 117, on the authority of *Prince Albert vs. Strange, post.*

Where the restriction is on the *mode* of the use merely, it does not deprive the circulation or exhibition of the character of a publication.

Jeweler's case (supra), p. 252.

In *Palmer vs. De Witt*, 47 N. Y., 532, it was held that the public representation in New York of the unpublished manuscript of a play of an English playwright did not authorize the printing and publication of the play itself in book form. This was on the ground (p. 542) that "The right publicly to represent " a dramatic composition for profit, and the right to " print and publish the same composition to the ex- " clusion of others, are entirely distinct, and the one " may exist without the other." The case may be harmonized with the principles maintained above, but

so far as there may be conflict, it must be deemed to have been overruled by *Jewellers Mer. Agency vs. Jewellers Pub. Co.*, 155 N. Y. 249, cited above.

Suppose a printed copy of a book should be sent to a public library where the public might read it, copying thereof being forbidden, would that amount to publication? If not, why might not 50 or 100 copies of the book be sent to as many public libraries under like restriction without publication resulting? Publication cannot depend on the *number* of books circulated, nor on the mere right to copy, nor indeed on any other fact than the fact of being so placed as that the public, *qua* public, may become acquainted with and enjoy it. To copy is not enjoyment of the thing copied, but to *use* it, in a special manner, with reference to some ulterior use of the copy. A published copyrighted book cannot, under the statute, be copied, but, nevertheless, it is published.

Suppose the prohibition against copying is for the convenience of the library, the gallery or the shop, would the fact of publication be altered from what it would be, if the prohibition arises from the author's or artist's intention to retain his supposed common-law rights.

The English Authorities.

Because of the great dissimilarities between the British statutes and our own, British cases can throw little light on the principles discussed above. We have said that there never has been in this country such thing as common-law copyright, *i. e.* an exclusive right to multiply copies *after* publication. But in England that much discussed question has affected the decisions.

In England, before the statute of 8 Anne, the English Courts held, in some cases, that there was no copyright at common law, and in others held that there was. In 1769 the King's Bench, after a thorough examination of the question, held in *Millar vs. Taylor*, 4 Burrows,

2303, by a divided court, that the exclusive rights of an author were not lost by publication either by operation of the common law or of the statute, but in 1774, in *Donaldson vs. Beckett*, 4 Burrows, 2408, the House of Lords, by a majority of the Judges, held that the statutory copyright superseded the common-law copyright, and to that extent overruled *Millar vs. Taylor*, but left undisturbed the principle that publication does not, by force of the common law, work an abandonment of the owner's rights, and therefore left that principle applicable to works which were not protected by the statute.

The great and fundamental questions of copyright were nearly all settled (for Great Britain) in *Donaldson vs. Beckett* and the cases decided in the first half of the following century were mostly declaratory of the English common law, but that law has not been adopted in this country with respect to literary and artistic property, except in a very limited sense. The later British cases turn rather upon interpretation of the language of statutes peculiar to the United Kingdom. For that reason it is necessary, in understanding the English cases, to inquire when they were decided and what statute they construe, and owing to dissimilarities between those statutes and our own, they are of but little value in settling questions which arise under the American statute.

In *Wheaton vs. Peters*, 8 Peters, 591, at 661, the Supreme Court held that our first copyright statute (1790) did not sanction an existing right, but created one, for the reason that the common law of England *relating to literary property* did not prevail in this country, and, even if the common law did prevail in this country, as the statute of 8 Anne had been construed in England to take away the common-law property in published works, the same construction should be given to the Act of Congress, and, although there has been some criticism of the statement that the common law of England respecting literary property did not prevail in this country, which it is not worth while

to consider here, nevertheless, since *Wheaton vs. Peters*, it has been uniformly held in this country, and last in *Holmes vs. Hurst*, 174 U. S., that there is no common-law copyright, and therefore, if an author does not avail of the provisions of the statute, he loses his exclusive rights in his works after publication. The difference between the American law and the English law as stated above in respect of the common law must be kept in mind in considering English authorities.

Therefore, under the English law in determining whether an author's rights were forfeited by publication of his work two tests are to be applied: (1) whether a statute covered the work for which monopoly was claimed, and (2) whether the work had been *published* within the meaning of the Statute. The first test is to be applied because, if the statute did not cover the work, the author might avail of his common-law right. The second test is to be applied because the statutory copyright term dated from publication, and without publication there could be no statutory copyright.

Under the American law, the first test is irrelevant because there is no protection for anything after publication, except under the statute. The second test is strictly irrelevant, because the term dates from registration.

In England in 1842 by Chap. 45 of 5 and 6 Vict. the statute of 8 Anne was repealed together with two statutes of Geo. III. and a Literary Copyright Act was passed which is now in force. By statutes passed in 1734, 1766, 1776 and 1836 protection was extended to engravings, prints, etchings and similar productions. In 1798 a Sculptors Act was passed and repealed in 1813, another being adopted in its stead which is still in force. In 1833 dramatic works were protected. In 1835 an act was passed giving protection against unauthorized reproduction of lectures.

In 1862 the first act was passed giving protection to *paintings*, drawings and photographs.

See *Macgillivray on Law of Copyr.*, p. 8 *et seq.*

These successive statutes differ in many material respects from each other, as, in view of the differences in subject matter they naturally would, and the later statutes differ from the earlier ones.

Our statute is comprehensive and covers all kinds of literary and artistic productions to which it has been deemed expedient from time to time to extend protection.

For example, in England, one statute covers engravings and prints, while another covers paintings. In this country one statute covers both. In the case at bar, the copyright of a painting is sought to protect the published copies of the photogravure of an alleged unpublished painting, the object of the statute, however, being to protect only published things, leaving unpublished things to the protection of the common law.

A few of the English cases are explained below; the others we believe to be irrelevant to the questions discussed in this brief.

In *Martin vs. Wright* (1833), 6 Simons (Ch.) 297, the plaintiff, an artist, painted from his own sketches a picture called "Belshazzar's Feast," which he shortly afterwards sold. Afterwards he engraved and published from his sketches a print of the same name which he copyrighted. The defendant having purchased one of the prints had it copied on canvas in colors, on a large scale and with dioramic effect, and publicly exhibited such copy for money, and described it as "Mr. Martin's grand picture of Belshazzar's Feast painted with dioramic effect." The plaintiff sought to enjoin this exhibition. The Vice Chancellor in refusing the injunction said: "Exhibiting for profit "is, in no way, analogous to selling a copy of the "plaintiff's print, but is dealing with it in a very dif- "ferent manner." "It appears to me that that act "never was intended to apply to a case where there "was no intention to print, sell or publish, but to ex- "hibit in a certain manner."

Whether under our act an injunction would have

been granted or refused it is unnecessary to discuss, but the case and the ruling illustrates the inaptness of citation of English cases to questions arising under our statute.

Turner vs. Robinson, 10 Ir. Ch. Rep., 121, was cited by defendant in error below to support his definition of "publication." It supports rather our contentions. The statement of facts in the opinion of the Master of the Rolls is long and complicated, but a careful reading, we think, discloses the following to be correct. One Wallis in 1856 painted a picture called "The Death of Chatterton," which was exhibited in the same year at the Royal Academy, and a wood engraving of it was published in a magazine with the permission of Wallis. In the same year he sold the picture to Egg, who exhibited it in the Royal Academy and at the Manchester Exhibition. In 1859 Egg sold to Turner, the plaintiff, the sole right to make and publish engravings of the picture and to exhibit it for short periods at any of the principal towns in Great Britain and Ireland, in order that Turner might obtain subscribers to purchase engravings. In February, 1859, Turner, under his agreement with Egg, exhibited the picture at the establishment of Cranfield in Dublin, where the defendant Robinson saw it, Robinson thereupon arranged models, both living and still, and scenery, in positions to imitate the figures and positions of the picture, and took stereoscopic photographs from the said figures and scenes and published the same for sale and sold some of them (10 Irish Ch., 125, 126). He admitted in his affidavit that he saw Wallis' original picture at the exhibition at Cranfield's in Dublin (p. 126).

Plaintiff brought suit in equity to restrain Robinson from exhibiting and selling his photographs. *The defendant claimed that there had been a publication of the painting by the exhibition at the Royal Academy*, the Manchester Exhibition and in Dublin, and that thereby the common-law "copyright" in the painting was lost. There was no evidence as to the rules of the Royal Academy, or of the Manchester Ex-

hibition in respect of copying, and the Master of the Rolls, of his own motion, wrote letters to the officials of those exhibitions inquiring as to the rules and was informed of the rules forbidding the copying of pictures there exhibited. *He thereupon decided that the exhibition of the painting at the Royal Academy was not such a publication as divested the owner of the painting of his right to restrain the sale of the copies.*

The defendant having objected to the use of the letters from the officials of the exhibition as irregular, the Master of the Rolls directed a reference to inquire and report in relation to the matters stated in those letters (p. 148), viz., the rules of the Royal Academy (see order p. 149).

The defendant having appealed from the order to the Court of Appeals in Chancery, the case was heard there before the Lord Chancellor and the Lord Justice.

The latter Court held that in their view of the case it was not necessary to decide the points raised by the order because in their opinion *it was not necessary to determine the effect of the exhibition at the Royal Academy* since they believed that the plaintiff's case could be maintained without carrying the order into effect (10 Ir. Ch., 510-512). The Lord Chancellor pointed out that *there was then in England no statutory copyright in a painting*, although books were protected by the statute of 8 Anne, and engravings and sculpture were protected by special statutes, and, therefore, an owner of a painting was thrown back on his copyright at Common Law. It was also observed that the term copyright as applied to works of art *not* protected by statute is entirely different from the same word applied to works that *are* protected by statute, the latter right being "an exclusive right to copy what has been made public, and founded on that very publication."

The Court decided that the exhibition at Cranfield's in Dublin was not a publication, because the exhibition there was for the *sole and special object* of obtaining subscribers to the engraving, and it was evident that Robinson knew when he went to Cranfield's to see the

picture that he was not at liberty to copy it, as he did not deny having seen the advertisement, inserted in a Dublin newspaper by Turner, cautioning all persons against pirating photographs of his picture.

The Court held that it was not necessary to decide upon the effect of the exhibition of the picture in the Royal Academy and at Manchester.

But in referring to the statutes protecting works of sculpture the Lord Chancellor remarked (p. 516):

" Again, in the statutes bestowing protection upon " works of sculpture, the *terminus a quo* from which " that protection commences is the *publication* of the " work, that is, *from the moment the eye of the public* " *is allowed to rest upon it.* Many large works in this " branch of art, which decorates public squares and " other places, are of course so published; but there " are others, not designed for such purposes, which " could never be published in any other way than in " exhibitions; therefore, *I apprehend that these works* " *of sculpture must be considered as, 'published,' by* " *exhibition at such places as the Royal Academy and* " *Manchester, so as to entitle them to the protection of* " *the statutes, from the date of such publication.*"

The Court went on to say that if, after a picture had been returned to the owner from an exhibition, a person were to steal into his gallery and copy the picture, or bribe his servant to admit him for the purpose, the Court would no doubt restrain that person from making public the copy so acquired, and then the Court said:

" the case before us appears to me to rest on the " same principle of property. Mr. Robinson does not " pretend that he had any permission to copy the " picture; his own advertisement, deprecating the " charge of having pirated the picture proves that he " knew he had no right to photograph it. * * * " Mr. Robinson must have known that he had no right " to make those photographs, and he cannot be per- " mitted to use for profit what he has thus taken with- " out the permission of the possessor of the picture."

Stress was laid upon the fact that the defendant had copied the thing which had been exhibited with a " sole and special object," and with an advertised notice cautioning against copying, and consequently there was a breach of trust.

The point, therefore, of *Turner vs. Robinson* was this : there being at that time no statute protecting paintings, the owner of the painting had common-law rights. The painting was exhibited for a special limited purpose, and prohibition of copying was expressed by advertisements. The defendant, having knowledge of the advertisement, saw the painting, and violated the conditions on which he was permitted to see it. The Court could and would enjoin that misuse of the privilege.

A similar decision on the same facts would not have been made here.

In *Oertel vs. Jacoby* (1872) 44 How. Pr. (N. Y.), 179 the Court held that the defendant might make and sell copies of an unpublished painting (Rock of Ages) using for the purpose engraved copies of the painting which had been published by the artist's consent.

Oertel vs. Jacoby was decided rightly but exactly contrary to the clearly erroneous prior decision of the same question in *Oertel vs. Wood* (1870) 40 How. Pr. 10, which was overruled in *Palmer vs. De Witt*, 47 N. Y., 532.

There are other English cases in which the test of publication has been stated to be in the understanding, express or implied, between the author and the persons permitted to use the production, as to the extent of such use, and if the permitted use was limited to special purposes, then the furnishing for such use was not deemed a publication.

Prince Albert vs. Strange (1849), 2 De G. & Sm., 652, is an apt illustrative case.

It was upon such cases that the idea was attempted to be founded in this country that, if the permitted use is limited, then the public to whom such limited use was permitted might be unlimited.

Of that proposition, PARKER, Ch. J., said in the Jeweler's case (155 N. Y., at 248):

" If that position be sustained by the judgment of
" the courts, then will have been obtained judicial
" legislation of far broader scope and much greater
" value to authors and others than that offered by the
" copyright statute."

Respecting the Application of § 4962 to Foreign Paintings, the Question of Extra-Territoriality Does Not Arise.

This Court held in *McLoughlin vs. Tuck*, 191 U. S., 267, that the penal provisions of § 4963 as amended by Act of March 3, 1891, has no extra territorial punitive operation and did not embrace the act of affixing in a foreign country to a publication, a false statement that it was copyrighted under the laws of the United States.

There the action was to recover money penalties under § 4963 which imposed a penalty for falsely impressing a notice of copyright upon a thing not copyrighted, the penalty to be paid by the *person* impressing the notice and recoverable by any person who might sue, one-half to himself and one-half to the government.

The section is a penal law. The act incurring the penalty, *i. e.*, the impressing, was committed abroad, and this court held that the punishment could not be inflicted against the person here.

But section 4962 requiring inscription of notice, as a condition of maintaining an action, is not penal, and has never been so held. The copyright owner suffers no penalty as such. The statute says, he shall not maintain an action unless the notice is given. A foreigner taking out copyright here, and wishing to sue here must conform to our laws. The statute makes no distinction between him and the citizen. By taking copyright under our laws he impliedly *contracts* to give notice conformably to our laws as a condition of maintaining a suit.

Flash vs. Conn, 109 U. S., 371.

In that case this court held that the liability created by a general act of New York that all stockholders of a corporation created under it should be individually liable to creditors, was *in contract*, and not a penalty,

and could be enforced by an action sounding in contract against a stockholder found in another state.

The distinction is also noted in *Huntington vs. Attrill*, 146 U. S., 657.

SECOND POINT.

Werckmeister, plaintiff below, had no right under Section 4952 to take out the copyright.

This matter was pleaded as a defense by the Answer (see Answer, clause II., Rec., marg., pp. 11–12).

At the trial, on the opening by counsel for plaintiff below, defendant moved to dismiss on the ground that the assignment by Sadler to plaintiff did not vest in the latter the right to take out a copyright. The Court remarked that this was a new question, and that he would deny the motion *pro forma* as the best way to take the question up for review (Rec., marg. p. 25). Defendant excepted.

The motion by defendant below to direct a verdict included the same ground, was denied, and an exception was taken (Marg. p. 93).

The rulings were duly assigned as errors. See Assignments of Error I. (Marg. p. 119) and XV. (Marg. p. 128), and are alleged in Court below as error (see 1st Asst., marg. p. 152, and 15th Asst. marg. p. 159), and see *ante*, p. 8 and 9.

If our contention under this point is sound, the above assignments should be sustained.

I.

Werckmeister was only a Licensee. The artist Sadler retained, after the transfer, complete ownership and control of the

painting, and a right to publish and dispose of it as he saw fit.

Sadler had sent the painting to Mr. Werckmeister to be photographed on March 8, 1894. It was returned to Sadler March 22, 1894. The so-called transfer was April 2, 1894. Mr. Werckmeister took out the copyright, April 16, 1894, so that the latter, at the time of the copyright, did not have even the possession of the painting (see Statement of Facts, *ante*, p. 2 - 3).

The plaintiff's right was based on the following instrument (Exhibit B, marg. p. 30):

"I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft for the sum of £200."

No American statutory copyright then existed. Whether a European copyright then existed does not appear, and it would be immaterial. Mr. Sadler retained the ownership of the painting. He himself testified for plaintiff below respecting the understanding (Marg., pp. 36–7):

"No agreement was necessary with reference to the painting as the transaction with the said Emil Werckmeister was solely an agreement for the sale of the copyright; he only had *the loan* of the painting for the purpose of its being photogravured with the understanding, as I have before testified, that he was to return it to me in time for its exhibition at the forthcoming exhibition at the Royal Academy in 1894, which he did."

Mr. Sadler also testified (marg., p. 39) that he was the "owner of said painting 'Chorus' at the time of "the exhibition thereof at said Royal Academy Ex- "hibition."

The painting was for sale by Sadler during the exhibition (marg., p. 42), and at a price fixed by him. Mr. Sadler himself sold the painting to Cotterell in 1899 (marg., p. 41).

His offering for sale was by an entry in the "Sale

Book" of the price and the title and his own name. The offer for sale was, however, with "copyright reserved", which was entered in the book (marg., pp. 43 and 48).

Neither plaintiff nor Mr. Sadler had in the transaction any special reference to the United States of America (marg., p. 27 and p. 37).

Plaintiff testified (marg., p. 27): "The copyright has been sold to me or to my firm for all countries without any exception." That is his construction of it.

Mr. Sadler testified (marg., p. 37): "I did not have reference to any specific country and copyright protection therein. I sold him the copyright outright and left him to do whatever he liked to protect himself by registering the copyright in this and other countries."

The entire transaction, execution of the contract and performance, occurred in London (marg., pp. 27, 30, 36).

The contract was not executory. It was completed and performed when signed and the money paid. Nothing further remained to be done by either party.

There is no evidence of any foreign statute or law and none are pleaded. It is immaterial whether the transaction conformed to the law of Great Britain or of any other European country.

The paper does not purport to assign any *interest* in anything, or the ownership of or any control over the painting or any right to its possession. It purports only to transfer a right or privilege to make copies.

The right or privilege is made personal to the transferee. There are no words indicating that it may pass to Werckmeister's assignees or personal representatives.

Sadler's reservation of copyright when offering the painting for sale at the Royal Academy Exhibition is immaterial. Plaintiff below was not affected thereby. His right is founded solely on Exhibit B, and would have been exactly the same whether Sadler had said

orally " copyright reserved " to a purchaser of the painting or not.

Whether the right alleged to have been transferred to Werckmeister was to make copies or to take out statutory copyright, in either case there was attempted to be transferred only a right which was *incidental to Sadler's creation and ownership of the painting.*

Sadler as creator had, while owner, the right to do what he liked with the painting—destroy it, keep it, sell it, exhibit it, copy it indefinitely and in any manner. Each of those rights, separately and together, were one and all incidents of his ownership of and property in the picture.

As owner he might authorize—*i. e.*, license—one person to view the painting, another to hold it, another to copy it and multiply copies. Persons so authorized would acquire no property in the painting, but only a privilege or license to do the specified thing concerning it. They would be *licensees.* Sadler would still remain the owner, subject to the licenses he had granted, until they should be revoked.

It follows that Werckmeister by Exhibit B became merely a *licensee* authorized to make copies, and, as an incident to that authority, *to sell* the copies for his own profit, this incidental right being derivable as an inference from the payment of the consideration—£200.

A license in respect to real estate is defined to be an authority to do a particular act or series of acts on another's land without possessing any estate therein.

Sullivan Timber Co. vs. City of Mobile, 110 Fed. Rep., 186-195.
Emerson vs. Birger, 76 Cal., 197.
1 *Washburn Real Prop.,* 398.
Bagg vs. Robinson, 34 N. Y. Supp., 37-40.

The word " license " means permission or authority, and the license to do any particular thing is an authority to do that thing.

Gibbins vs. Ogden, 22 U. S., 193.
U. S. vs. Ptanta, 27 Fed. Cas., 544–546.
Clark vs. Glidden, 60 Vt., 702.

In the law of patents a license is an authority to exercise *some* of the privileges secured by the patent, but which still leaves in the patentee the monopoly of the patent.

Theberath vs. Celluloid Mfg. Co., 3 Fed., 143–147.
McKay vs. Smith, 39 Fed., 556–558.

The sole matter conveyed by a license is the right not to be sued by the patentee.

Heaton Pen. Button Fast. Co. vs. Eureka Specialty Co., 77 Fed., 288–290 (25 C. C. A., 267).

A license is not assignable or descendible without apt words.

In *Oliver vs. Rumford Chemical Works*, 109 U. S., 75, there had been transferred to M. by a patentee the exclusive right to make, sell and use in a specified territory for five years the subject matter of the patent and *without any words of assignability in the instrument.* This court held that the instrument was a license merely and which conferred a right personal to the licensee and not one which was capable of passing to an executor, administrator or assignee, and Mr. Justice BLATCHFORD, writing the opinion, said (p. 82):

"It is well settled that *a transfer of a right* such as Morgan acquired *is not an assignment*, nor such a grant of exclusive right as the statute speaks of, *but is a mere license.*"

In holding as above this court followed its prior decision in *Troy Iron & Nail Factory vs. Corning*, 14 How., 193–216.

The limitation of the authority to five years in the case just cited was not material in fixing the character of the instrument, because in *Troy Iron & Nail Factory vs. Corning*, 14 How., 193–216, the period of the authority was not limited. So also in *Hapgood vs. Hewitt*, 119 U. S., 226–234.

And in *Bowers vs. Lake Superior Contracting &*

Dredging Co., 149 Fed. Rep., 983 (see advance sheets) the Circuit Court of Appeals, 8th Circ., held (p. 986):

"A license to use a patented invention that does "not contain words importing assignability is a grant "of a mere personal right to the licensee which does "not pass to his heirs or representatives, and which "cannot be transferred to another without the ex- "pressed consent of the licensor."

II.

Plaintiff below as a mere licensee could not take statutory copyright.

An author cannot *before publication* assign the right or privilege of taking a copyright under the statutes of the United States independently of an assignment of the copyrightable thing itself.

A mere licensee cannot copyright.

Section 4952 (as amended March 3, 1891), provides:

"The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators *or assigns* of any such person shall, upon complying with the provisions of this chapter, *have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same*," &c.

The monopoly is one entire thing.

The terms "author, inventor, designer" refer to the creator of the book, map, chart, painting, statue, *etc.* The term "proprietor" refers to the person who has a copyrightable thing made for him under such conditions as to make him the proprietor of it, *viz.*, one who causes a digest or like work to be compiled for him, or a painting to be painted. Thus it was held in *Dielman vs. White*, 102 Fed. Rep., 892, in reference to pictures made for the Congressional Library, that if a patron gives a commission to an artist to execute a

work of art, the work of art belongs unreservedly and without limitation to the patron and a statutory copyright taken thereon by the artist was void.

Reduced to fewest words, the section is "The author, &c., his executors, administrators or *assigns* shall have the sole liberty, &c.

The word "assigns" in the section means the *assigns* of the copyrightable thing and that only.

The word is not expressly qualified or limited, and, therefore, it is impliedly unqualified. It is as comprehensive, in respect of the property passing, as the words "executors or administrators." The personal representative takes the book or painting, and, if it has not been published, *he* may copyright. The *assign* takes the book or painting, and *he* may copyright, as assignee of the copyrightable thing.

Sadler, under the terms of his transfer, retained the rights to print, publish, complete and vend the painting (everything except copying). Werckmeister got only the right or privilege of copying.

The *assigns* of the statute is given rights expressly as complete and extensive as the author's, inventor's or proprietor's. The statute endows the "author, inventor, designer or proprietor" and the "executors, administrators or *assigns* of any such person" with the *sole* right to print, publish, complete, copy and vend. The *assigns* who cannot exercise *all* the mentioned rights is not the assigns of the statute because his right would be limited to *less* than what the statute says he shall take.

If Werckmeister had also acquired the property in the painting, then he would have been an assignee or assigns within the statute.

Therefore, if a licensee can take out a statutory copyright, he can create an assignable and descendable right out of a privilege which was neither.

When the author, proprietor or the *assigns* of the statute complies with the provisions of the Act and takes out the statutory copyright, then a statutory right comes into existence which is distinguishable

from the thing, *e. g.* the painting, which was copyrighted, and that new right may be sold, mortgaged or otherwise assigned (Sec. 4955). The ownership of the painting and the ownership of the statutory copyright may then be in different persons.

The argument, therefore, comes to this :

On April 2d, 1894, Sadler as an artist and owner had an *exclusive* right to copy the painting, and it was exclusive because the painting had not *then* been published. That right was a common law right which was incident to his creation and ownership of the painting.

That right would remain exclusive only so long as the painting remained *unpublished*. On the day the painting would be published, the exclusive character of the right would vanish.

That right being intangible and a mere incident of creation and ownership was not in itself property, but only an incident of the enjoyment of property. It was not descendible nor assignable *independently* of the painting, but it could be exercised by Sadler's licensee, and by as many as he chose to authorize.

That strictly personal and limited right, privilege rather, he gave to Werckmeister *personally*, but not to his assignees or his personal representatives. That personal privilege could not be converted by Werckmeister into an assignable or descendible property, and its character so affected as that it would become exclusive even after publication by Sadler, a quality which it did not have while Sadler possessed it, and which Sadler could not give it, unless the statute says that all that can be done.

The statute does not say so ; it says that only Sadler or his *assigns* could do that, and Werckmeister was not an assigns, 1st, because, the privilege he got was not assignable by him, and 2d, because he did not, under the bargain with Sadler take the other incidents of Sadler's creation and ownership, *i. e.*, the right to complete, publish and vend the painting which was the thing copyrighted, and all those rights the statute says the *assigns* shall take, and he who does not under the

bargain, get them, is not the *assigns* of the statute.

The right to "complete" is conspicuously important in the case of "models or designs intended to be perfected as works of the fine arts" (expressly copyrightable, § 4952), and might be important in case even of the MS. of a book.

Suppose the instrument executed by Sadler had read thus, "I hereby transfer to W. the right to make copies of my picture, &c.," the legal import would not have been changed. Or suppose it had read thus, "I hereby transfer to W. the *exclusive* right to copy my picture, &c.," the legal import would not have been changed excepting Sadler could not have licensed any one else. The nature of W.'s interest would have remained the same.

Suppose it had read thus, "I hereby transfer to W. the right to copy *for five years*," the legal import would not have been changed so far as W.'s right and its nature are concerned, except to limit the *duration* of the privilege. In the last case it could not be pretended that W. had an estate or interest which would enable him to take a United States copyright in his own name and for himself for twenty-eight years.

Statutes in Pari Materia May Aid Interpretation.

Section 4962, considered under First Point, requires notice on the painting or its mount as a condition of maintaining an action. This presupposes such control of the painting at the time of or after copyrighting as that the notice may be inscribed on the painting, at least, if the painting is published. But a licensee has no such control. Werckmeister reserved none. No obligation of Sadler to do the inscribing can be derived from the transaction. Moreover, Section 4962 says "*he* shall give notice;" that is, the owner of the copyright, because "*his* copyright" is mentioned just before in the same sentence.

Thompson vs. Hubbard, 131 U. S., 123-150, held the notice to be a condition of perfecting the copyright.

Section 4963 provides a penalty for falsely marking an article as copyrighted which has not been copyrighted. If Sadler had inscribed his painting with the notice and Werckmeister had not in fact copyrighted, he would have been liable for the penalty; that is, if the offense was committed here. The *locus* of committing the offense is not material to the present point, because the result would follow if the act were committed here. These considerations may not have much weight, but Chief Justice MARSHALL said in *U. S. vs. Fisher*, 2 Cranch, 386:

" Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived."

Considerations derived from Sections 4962 and 4963 are in harmony with our views.

Former Adjudications.

The Only adjudications on the point, of which we are aware, are the following. The Circuit Court of Appeals in the case at bar affirmed on the opinion of Judge PUTNAM in *Werckmeister vs. Pierce & Bushnell*, 63 Fed. Rep. 445, and the opinion of Judge HOLT in *Werckmeister vs. American Lithographic Co. et al.*, 142 Fed. Rep. 827.

See Opinion C. C. A. Rec., Marg., p. 140.

In *Werckmeister vs. Pierce & Bushnell*, 63 Fed. Rep., 445, the instrument of transfer read (see opinion, p. 446) " I transfer hereby to, &c., the right of publica-" tion—by which I wish to have understood the *exclu-" sive right of reproduction*, &c." (italics ours). The painting was copyrighted in the name of the transferee.

Judge PUTNAM correctly said (p. 450)

" the word ' assigns,' on which the complainant relies, " is ordinarily construed as only indicating the nature " of the estate, and its ordinary effect is only to the

" extent of declaring that whatever is obtained is of " an assignable character. Strictly, an authority to, " assign, or an assignment, relates to what already " exists, and has no pertinency to the creation of a " right out of another right,—as by the instrument " given by Naujok (the artist) to the complainant. " Such instruments are ordinarily spoken of as " 'licenses,' and not 'assignments,' and the holders of " them as 'licensees,' and not 'assigns'."

The learned judge then, because the instrument was executed in Germany " where the technical rules of " the common law touching the particular phraseology " required to create more than a life estate or a per- " sonal interest do not exist," adds, not as a deduction from his premises, but as an assumption of the point to be determined,

" It cannot be questioned that all the right which " Naujok (the artist) had to publish or reproduce " passed out of him, and, as it was in him assignable " and descendible, it follows necessarily that the same " qualities attach to it as vested in the complainant.

It was not descendible in him detached from the painting. To say that it was *assignable* by him detached from the painting begs the question.

Whether, if the case at bar had then been before the court, the fact that the common law does exist in England would have affected the reasoning or the decision, we need not suggest, but the learned judge erred in his premises. The right which Naujok, the artist, had to *publish* did not pass out of him. The instrument limited the grant to copying *viz.* "I transfer hereby—the right of publication—*by which I wish to have understood the exclusive right of reproduction.*" The artist granted only a right to copy and retained the *right to publish*, vend &c.

The learned judge added

" on the whole, it involves no violent presumption " to maintain that section 4952 of the Revised Statutes, " in its use of the word 'assigns' had no reference to " its narrow, technical meaning to which we have " referred."

We submit that it does involve a presumption to assume that section 4952 the term "assigns" intend a person sole right to print, publish, complete, vend the copyrightable thing, for these nothing less, the section says the assigns s

The Court's decisions was further the untenable ground (p. 45) that as "proprietor" is mentioned as one who may take copyright, the "assigns" must mean something else, *e. g.* a licensee. We submit not so. "Proprietor" is one who has a work made for him and to whom no assignment is necessary for vesting the title in him, therefore an assigns may be the assignee of the work, the vendee of the creator.

This Court held in *Mifflin vs. White*, 190 U. S., 260–262, construing the act of 1831, that "proprietor" of the 4th section had practically the same meaning as "legal assigns" of the 1st section.

The further ground on which the learned judge supported his reasoning, *viz.* that the artist migh have taken the copyright and have then assigned it to the complainant, and a construction which avoids that circumlocution cannot be "unjust or against good sense" (p. 452) does not seem to commend itself in a matter of statutory interpretation. It would not have been circumlocution, because the number of acts to be done and the manner of doing them would not have been altered.

As already mentioned the decision was reversed by the Circuit Court of Appeals (1st Circ.), 72 Fed. Rep., 54, but not on the point just considered.

In *Werckmeister vs. American Lithographic Co. et al.* 142 Fed. Rep., 827, Judge HOLT concurred in the views of Judge PUTNAM, but also gave the question some independent consideration as follows:

(1) To the argument that Werckmeister could not, under his assignment from Sadler, "complete, execute or finish Mr. Sadler's painting unless he had the painting," the learned judge replied that "Mr. Werck-
"meister probably could not *properly* complete, exe-

Sadler's painting, *if* [illegible] thought that [illegible] requir[illegible] [illegible]are in ord[illegible] copyright, o[illegible] [illegible]tist to find a purch[illegible] willing buy [illegible]h the [illegible]ure and the copyright [illegible] burdensome (p. 831). The answer is that [illegible] copyright the painting and then sell ea[illegible] to separate persons.

The above reasons seem to have little force.

(3) The learned judge also remarked that "the law "has always been recognized that a common-law copy- "right, before a general p[illegible]ation, is a distinct prop- "erty from the thing to which the copyright applies. "One man may be the owner of the thing, and another "of the copyright in the thing," and instances this by the proposition that a man who writes a letter continues to own the expressions of the letter while the the addressee owns the paper (Opinion, p. 830).

The illustration does not support the proposition. Since Lord ELDON'S decision in *Gee vs. Pritchard*, 2 Swanston, 402, courts of equity have endeavored to find grounds on which to *suppress* the publication of letters by the receivers of them where such publication would be a breach of confidence and good morals, and, finally, a special property which the writer may impliedly be supposed to have in the words and expressions of a private letter has been deemed a basis stable enough to support an injunction in a proper case. The history of the question and a review of the English cases, with a discussion of them, is found in Judge DUER'S opinion in *Woolsey vs. Judd*, 4 Duer (N. Y.), 379. But the rule is subject to an important qualification and exception declared by Judge STORY in *Folsom vs. Marsh*, 2 Story R., 110, 111, viz: that although the writer of private letters may possess the exclusive right of first publishing them, nevertheless the receiver may publish them without the writer's consent, "upon occasions which require or justify publication" as "when such use is necessary or proper to

maintain his action or defense," or when it "may be necessary to vindicate his character and free him from unjust obloquy and reproach."

The foregoing qualification was adopted by all the judges of the court in *Woolsey vs. Judd* (see 4 Duer, 405 6).

The qualific[illegible] of the so-called rule illustrates the divis[illegible] of the property in the letter to ownersh[illegible] of the paper by the addressee and ownership of the [illegible]ting on it by the writer is a mere [illegible]ction which equ[illegible] contrives to work out justice. A letter written [illegible]he confidence of friendship or of some personal relation ought not to be published without the writer's consent to the disparagement of the writer, and, on the contrary, it should be published if the vindication of the addressee requires it. That is supposed to be the implied compact of the correspondence. But as the addressee of the letter is the donee of both the paper and the writing on it, and as Equity must rest its conclusions upon personal legal rights of property or perhaps some personal right the invasion of which would be injurious to the individual (see opinion of Judge PECKHAM in *Schuyler vs. Curtis*, 147 N. Y., 443) the determination of rights by fairness alone not being its province, a special property in the expressions which has been retained by the writer has been predicated upon the situation and the publicity of the expressions has been permitted or their privacy enjoined according to the proprieties of the controversy, and the morality of the litigants.

It is a far cry from such an elastic rule as that to the proposition which Judge HOLT illustrated by it.

We have been unable, after diligent search, to ourselves find, and we have not been referred to any case which militates against our view.

Stephens vs. Cady, 14 How., 528, and *Stevens vs. Gladding*, 17 How., 447, are in harmony with our view. In both a copyright of a map had been lawfully taken; a copper plate from which the maps had from time to

time been printed was levied upon and sold under execution. The question was whether the purchaser of the copper plate could print the copyrighted map. This court held he could not; that the two properties were distinct and that under the statute a copyright could not be levied upon and sold in that way. The *statute* makes copyright a distinct assignable and descendible property; it converts the creator's exclusive right to copy, exclusive, that is, before publication, into a distinct property; the copper-plate was merely a tool for using it.

In *Paige vs. Banks*, 13 Wall., 608, Mr. Paige had made a contract with G and B whereby he agreed to furnish, during the term of five years to G and B "*in* "*manuscript* the reports of the said court for *publi-*"*cation*, and that the said G and B *shall have a copy-*"*right of said reports for them and their heirs and* "*assigns forever.*" The contract was under the act of May , 1790, granting copyright for 28 years. During its term the act of [illegible] granted an extended term of 14 years to authors, widow or children. The controversy was as to the ownership of that extended term. Note that the agreement was that Mr. Paige was *to furnish the manuscript to* G and B. The case therefore did not involve the point now under discussion.

In *Belford vs. Scribner*, 144 U. S., 488, a married woman had compiled a cookery book. Scribner "an agreement with the said lady, undertaking to be-"came interested in, and assumed the full respon-"sibility of, the publication of said work;" which agreement was made and to be performed in New York (see p. 490). The plaintiff in error, on the rule that "at common law a married woman has no interest in "personal property acquired by or through her during "marriage, but it belongs absolutely to her husband," and as no proofs had been introduced of married women's acts in either New York or New Jersey, contended that the common law must prevail and the husband was entitled to the wife's earnings during covert-

ure, and hence Scribner by his contract with the lady derived no copyrightable interest in the book (p. 499). This court overruled that contention (p. 504) and held the Scribner title to be good. The contracts between the lady and Scribner are not set forth and the relation of the terms thereof to the point now under discussion in the case at bar cannot be determined.

We are unable to see that *Callaghan vs. Myers*, 128 U. S., 617, bears upon the point. In this case, the physical MS *was delivered* and Mr. Justice BLATCHFORD said (p. 658):

"*While the work was in manuscript no written transfer of such manuscript from Mr. Freeman was necessary, because the copyright had not yet been taken.*"

It was evidenced by the delivery of the MS.

We need not and do not dispute that a right to obtain statutory copyright may be transferred by parol, but only provided the ownership of the copyrightable thing is simultaneously transferred. We may go further and say that if an author delivers a manuscript to B, hitherto unpublished, B as an incident of his ownership may copyright it even if nothing is said about copyright (*Mifflin vs. White*, 190 U. S., 263). It would follow, if a right to take out statutory copyright *before* publication can be transferred *without* transferring the title to the copyrightable thing, that transfer need not be in writing but may be by parole. If it may be by parole, it may be inferred from circumstances. And if by parole it might be a question how the transaction would be affected by the Statute of Frauds.

In *Palmer vs. De Witt*, 47 N. Y., 532-540, it was said "the assignability of a copyright before publication is not questioned." The opinion referred to the common law right existing before publication and recognized at page 536. The court did not mean that the right to take statutory copyright could be assigned independently of the copyrighted thing, and this is shown by the words next following, viz.: "The right

of sale and transfer is one of the inseparable incidents of property, and *the property in a manuscript may be transferred*, and upon the death of the owner goes to the personal representatives or next of kin of the owner, as other personal property."

No Question of Agency Arises.

Even if an agent can take out a copyright in his own name, Mr. Werckmeister did not copyright this painting as agent for Sadler. There was no fact on which agency can be predicated. Sadler testified that "the transaction with the said Emil Werckmeister was solely an agreement for the sale of the copyright" (marg., p. 36). Mr. Werckmeister's testimony is of like import (marg., p. 27). No principle or feature of agency is discernable.

THIRD POINT.

Section 4965 cannot be enforced by an action in replevin.

The writs of replevin and proceedings thereunder were unwarranted in law and illegal.

The action being in form and substance an action in replevin was not maintainable.

Assignments of Error XVI. (m., pp. 128, 129), XI. (m., p. 126), XII. (m., p. 126) and XIII. (m., p. 127) are included under this point.

If our contention under this point is sound, the above assignments should be sustained.

At the close of the trial, the jury having rendered a verdict in favor of the plaintiff below by direction of the Court, the defendant below moved to set aside the

verdict and for a new trial "on the ground that replevin under the statutes of the State of new New York is not an appropriate remedy or a lawful and legal remedy for taking possession of the alleged incriminating sheets or pictures, and that the proceedings taken in that behalf by the plaintiff were illegal and invalid, and that the plaintiff cannot avail of any benefit of that proceeding, and the introduction in evidence of the replevin proceedings was an error" (marg., p. 95). The motion was denied and exception duly taken (marg., p. 96).

The admission in evidence of a stipulation setting forth the issue and execution by the United States Marshall for the Western District of New York of a writ of replevin, was objected to by defendant below on the ground that such replevin proceedings "was an invasion of defendant's constitutional right, was an unwarranted search, an illegal act, and nothing done under it, or information obtained by virtue of it can be used in evidence against defendant under the fourth and fifth amendments of the United States constitution," to which ruling defendant below duly excepted (marg., p. 82-3). The stipulation is at marg., pp. 83-84. *Defendant's objection was made under a reservation contained therein at the end thereof permitting the same* (marg., p. 84).

Plaintiff below also offered in evidence the original writ of replevin and the affidavit on which the same was granted, and the return of the Marshall showing his execution of the writ, to which defendant duly objected and excepted to the ruling admitting them in evidence. The said papers are Exhibit K (marg., pp. 99-105).

Plaintiff below also offered in evidence another writ of replevin directed to the United States Marshal for the Southern District of New York, the affidavit and the return of the Marshal, to which also defendant below objected and to the ruling admitting the papers duly excepted (marg., pp. 85-86).

These papers are Exhibit L (marg., pp. 107-111).

The first writ of replevin was executed by the U. S. Marshal for the Southern District of New York on June 23, 1902 (marg., p. 71).

The second writ of replevin was executed by the U. S. Marshal for the Western District of New York on June 29, 1902 (marg., p. 105).

As appears above, the question of the illegality of the Marshals' seizures on the ground that the action of replevin under the New York Code was not adapted to working out a forfeiture of infringing sheets was not directly raised until defendant's motion for a new trial after the verdict, but substantially the same question was raised by defendant's objections to the admission in evidence of the Replevin proceedings by the Marshal for the Western District and to the Replevin proceedings by the Marshal for the Southern District, on the ground that the same "constituted an illegal proceeding" (see marg., p. 85, and for argument to support the objection see marg., p. 86). The admission in evidence of the same (Exhibits K and L) being assigned as errors by Assignments XI. and XII. (marg., p. 126, 127). To the grounds of objection mentioned above were joined objections that the executions of the writs were invasions of defendants's rights under the Fourth and Fifth Amendments to the Constitution. The executions of the writs would seem to have been such if they were not warranted by law.

And see Point at page 100, *post*.

There can be no question that this is a replevin action. The process and pleading of the plaintiff below makes that plain. It was brought and prosecuted under the Replevin sections of the New York Code of Civil Procedure and was so stated by counsel for plaintiff below at the trial (marg., p. 21), and again at marg., p. 94, and also marg., p. 87, where counsel said he wished to prove the value "as the action takes the form of an action in replevin and the Code of Civil Procedure requires the value to be given."

Propositions of Plaintiff-in-error Briefly Stated.

Briefly stated the main propositions of plaintiff-in-error are

(1) Replevin under the New York Code of Civil Procedure is not adapted to proceedings for enforcing the forfeiture of infringing sheets accruing under U. S. Rev. Stat, § 4965.

(2) The Circuit Court was without authority to adapt or mold the New York Replevin Statutes to forfeiture proceedings under § 4965.

(3) If the foregoing are valid, the plaintiff's proceedings in this action were without authority of law, and the Circuit Court was without jurisdiction to try the action or render a judgment.

Brief Mention of Adjudications on the Question.

The Circuit Court in Pennsylvania and the Circuit Court of Appeals (3d Circt.) have held that the Replevin action of Pennsylvania is not adapted to enforce a forfeiture under § 4965.

See cases reviewed, *post* pp. 90 to 93.

In the case now at bar, the Circuit Court of Appeals after stating that the decisions "upon this *vexed* question are not altogether harmonious," adds (Rec., marg., p. 141):

"The question can be decided only by the Supreme Court and even if we were of the opinion that the action and the writ were of more doubtful validity than we are inclined to attribute to them, it would seem to be the wiser course to affirm and thus secure a final determination of the question."

Origin of Replevin Proceedings to Enforce the Forfeiture of Sheets Under Section 4965.

The recent practice in the U. S. Circuit Courts of taking proceedings in Replevin under State statutes arose from a misunderstanding of certain expressions used by this Court in the two following cases.

Thornton vs. Schreiber, 124 U. S., 612, was an action under Sec. 4965, not for the forfeiture of sheets, but to recover the money penalty. Thornton, the defendant below, was an employee of Sharpless & Sons, who had paid for the sheets, and everything done by Thornton respecting them was as such employee. Judgment had gone against Thornton. This court, on writ of error, reversed the judgment on the ground that Thornton's possession was not such possession as would authorize the copyright proprietor to proceed against *him* for forfeiture under Sec. 4965; that *his* possession was the possession of his employer, Sharpless & Sons, and to illustrate this distinction, and the nature of Sharpless & Sons' property in the sheets, this court said (p. 620): "An action of replevin could have been sustained against them," *i. e.*, Sharpless & Sons, "for the possession of these goods, or an action of trover, if they had been the property of plaintiffs, on account of the possession of them by Sharpless & Sons."

Bolles vs. Outing Co., 175 U. S., 262, was also an action under Sec. 4965 to recover the money penalties, and this court said (p. 266):

"No remedy is provided by the act, although by section 4970 a bill in equity will lie for an injunction; but the provision for a forfeiture of the plates and of the copies *seems* to contemplate an action *in the nature of replevin* for their seizure, and in addition to the confiscation of the copies, for a recovery of one dollar for every copy so seized or found in the possession of the defendant." (Italics ours.)

No justification for replevin can be found in *Thornton vs. Schreiber*, because the reference there to replevin

was for the purpose of illustrating the nature of the employer's, Sharpless & Sons, title and the liability to respond for acts for which Thornton had been sued.

In *Bolles vs. Outing Co.* the reference was a *semble* and was to a proceeding *in the nature* of replevin, but whether replevin would lie was not in any manner involved in the case.

There can be no forfeiture of sheets unless the infringing sheets are in the defendant's possession.

Section 4965 under which the cause of action for forfeiture of sheets accrues is, in part, as follows:

"Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any *painting*, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, *engrave, etch, work, copy, print, publish, dramatize, translate, or import*, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, *he shall forfeit* to the proprietor all the *plates* on which the same shall be copied, and *every sheet thereof*, either copied or printed, and shall further forfeit one dollar for every sheet of the same *found in his possession*, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for *every copy* of the same *in his possession*, or by him sold or exposed for sale; Provided, however,"

Two things are forfeited, viz., (1) plates and sheets, (2) one dollar for every *sheet*, but in the case of a painting $10 for every *copy*.

Respecting the money forfeiture of $1 per sheet, the sheets must be "found in his possession." Respecting the forfeiture of $10 per copy of the painting, the copies must be "in his possession, &c."

The action at bar is for the forfeiture of copies, and in this action, so far as the complaint claimed, we have nothing to do with the money forfeiture.

The section does not, perhaps, *expressly* condition the forfeiture of sheets or copies on the circumstance of their being "found in his possession" or "in his possession," but we think that condition is necessarily *implied, i. e.* to work a forfeiture of the sheets they *must be in possession*, and the same is true of the *copies* of a painting. There can be no forfeiture of sheets or copies without possession.

That proposition is based upon the following consideration

The person who forfeits is the person who shall "engrave, etch, work, copy, print, publish, dramatize, translate, or import," or who "shall sell or expose to sale any copy of such map or other article as aforesaid, *he shall forfeit*, etc." If the physical thing, *i. e.* the plates or sheets, have gone out of *his* actual or constructive possession certainly *he* cannot forfeit. A defendant could not forfeit what he has destroyed nor what he has absolutely sold and delivered.

In *Thornton vs. Schreiber*, 124 U. S., 612, Schreiber & Co., the defendants-in-error, plaintiffs below, and owners of the copyright, insisted that the words "found in his possession" were to be construed as referring to the finding of the jury. But this court held "that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant."

In *Bolles vs. Outing Co.*, 175 U. S., 262, this court concurred with the Circuit Court of Appeals (p. 268), "that the words 'found in his possession' aptly refer "to a finding for the purposes of forfeiture and con- "demnation. 'The remedy by forfeiture and con- "demnation is only appropriate in a case where the

" property can be seized upon process, and where, as " here, the forfeiture declared is against property of " the 'offender' is only appropriate when it can be " seized in his hands.'"

Whether an action for the money forfeiture can be maintained separately from an action for the forfeiture of the sheets does not arise in the case now at bar, but may arise in No. 288 on the docket of this court.

In *Bolles vs. Outing Co.*, 77 Fed. Rep., 966 (C. C. A., 1st Circt.), affirmed by this court by the case cited above, the forfeiture of the sheets and plates and the forfeiture of the money was held to be conditioned upon such possession as that the offending property could be seized in the offender's possession.

We submit therefore

That the offending sheets or copies must be found in, or be in the defendant's possession, as a condition of the forfeiture of them.

The Copyright Owner Has No Right of Property or of Possession Until Judgment.

Section 4965 provides that infringing sheets shall be forfeited to the proprietor of the copyright. Until there is a judgment of forfeiture there can be no right of property or possession in the proprietor of the copyright. The mere fact that sheets are in an alleged infringer's possession or found there does not make them the property of the copyright owner nor has he any right of possession in them *until* there is a finding by a competent court that they are forfeited under Section 4965.

When Does Forfeiture Occur.

Forfeiture is not complete so as to vest title until an action on the part of the person entitled to the forfeiture and a *judgment* of forfeiture by the Court.

In *Clark vs. Protection Insurance Company*, 1 Story, 109, 134, Judge STORY said :

"It is not correct to say, that property forfeited is vested in the government at the very moment of forfeiture, and the title of the owner immediately divested. On the contrary, the established doctrine is, that, *notwithstanding the forfeiture, the property remains in the owner, until it is actually seized by the government*, and then by the seizure the title of the government relates back to the time of the forfeiture. In the case of *United States vs. 1960 Bags of Coffee* (8 Cranch, 404), and *Gelston vs. Hoyt* (3 Wheaton R., 247, 311), there had been a seizure and prosecution for the forfeiture by the government. The case of *The Mars*, in this Court (1 Gallis R., 192, 198), as to this point, has never, to my knowledge, been doubted or denied. The case of *Lockyer vs. Offley* (1 Term. R., 252, 260), manifestly proceeded upon the ground, that until seizure the property of the owner was not divested. Mr. Justice WILLES, in delivering the opinion of the Court in that case, said : 'But it has been said, that under the Stat., 24 Geo., 3, ch. 47, and the Excise Laws, the forfeiture attaches, the moment the act is done ; and that the barratry (smuggling) was committed during the voyage. It may be so for some purposes, as to prevent intermediate alienations and incumbrances. But I think *the actual property is not altered, till after the seizure*, though it may be before condemnation.' The same doctrine was taken for granted by the Supreme Court in *The Ocean Insurance Company vs. Polleys* (13 Peters R., 157). I am aware of the bearing of the cases of *Fontain vs. The Phoenix Insurance Company* (11 Johns. R., 293), and also of the incidental confirmation of the doctrine thereof in *Amory vs. McGregor* (15 Johns. R., 24). But I am not prepared to accede to the doctrine there stated, opposed, as it is, to the other authorities and doctrines aleady stated. In short, I have been long accustomed to lay it up as an elementary axiom that, *in all cases of forfeiture of personal chattels, the property of the owner is not divested, until there is an actual seizure thereof by or for the use of the government.*" *(Italics ours.)*.

In the cases cited, the question had been considered and it had been held in one or two of them that the title to forfeited property vested in the government at

the time of the violation of the statute, but Judge STORY distinguished these cases as appears above, and in the case of The Mars, which he says was never doubted or denied, he elaborately discussed the question and reached the conclusion stated in the above quotation.

In *Henderson's Distilled Spirits*, 14 Wallace, 44, at p. 56, the Court said:

"Where *the forfeiture is made absolute by statute*, the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree. Subsequent payment of the duties, therefore, is no defence to an information for a forfeiture founded upon antecedent wrongful acts, as the effect of such wrongful acts, where the forfeiture is made absolute by statute, is to divest the owner of all property in the goods seized and to vest the title to the same in the United States, *in case a prosecution ensues and a decree of condemnation follows*, as the decree of condemnation, when entered by a court of competent jurisdiction relates back to the date of the wrongful acts as alleged and proved at the trial or in the hearing of the cause." (*Italics ours.*)

In the case last cited, as in other similar cases, the question arose because of an alienation of the property intermediate the violation and the prosecution. This exception was referred to by Judge STORY in the above quotation from his opinion.

And the Court further said that the cases

"establish the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, *or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent.*" (*Italics ours.*)

But Section 4965 does not work *an absolute forfeiture*, because it is necessary, to work a for-

feiture, that the sheets should be found in possession of the person who "engraved, etched, worked, copied, printed, published, dramatized, translated or imported the sheets," or who, knowing the same to be so printed, &c." shall "sell or expose to sale." The language is "*he* shall forfeit, &c."

See *Bolles vs. Outing Co.*, 77 Fed. Rep., 966, decided by Circt. Ct. of App., 2d Circ., and affirmed by this Court, 175 U. S., 267, 268.

A person who has the sheets in possession, but who has neither engraved nor etched, &c., nor has sold or exposed to sale any copy with knowledge that it had been printed, published, etc., does not forfeit the sheets.

The acts, to which the Court referred in the *Henderson* case, worked a forfeiture of the goods irrespective of the guilt or innocence of the person having them in possession (see 14th and 45th Sections, p. 45 of 14 Wall.) and proceedings against the forfeited goods were *in rem* and not *in personam*.

But it may be said that the words of Section 4965 "found in his possession" refer only to the forfeiture of one dollar and not to the forfeiture of the plates and sheets. We think the contrary, because the plates and sheets are forfeited by *him* who engraves, etches, etc., or knowingly sells or exposes for sale, etc., "*he* shall forfeit, &c.", and *he* cannot forfeit unless they are in *his* possession actually or constructively. The two forfeitures necessarily go together.

Thornton vs. Schreiber, 124 U. S., 612, seems to support this view.

If "he" cannot forfeit the sheets or copies unless they are in his possession or are "found in his possession," then the forfeiture worked by the statute is not absolute but conditional, depending on the sheets or copies being in his possession or found in his possession. Then the forfeiture does not relate back to the date of the offending act, viz., the engraving, etching, etc., or the selling or exposing for sale, etc., but to the

date of being or finding in possession. Therefore it follows that the *title or right of possession* does not vest until the judgment with a possible relation back to the date of the sheets or copies being found in possession. As these sheets were not found in possession until the seizure under the replevin writ there could be no relation back to the *commencement* of the suit, nor to the making of the replevin affidavit, which *must* have preceded the actual replevy.

As was said by Judge STORY, as quoted above, "*the property of the owner is not divested, until there is an actual seizure thereof*, &c." And in Replevin there can be no seizure until *after* the action is commenced, and especially *after* the affidavit of the plaintiff is made.

In the *Mary Celeste*, 2 Lowell, 356, it was said:

"It is true of all forfeitures that they must be completed by seizure and the other requisite proceedings before the title will vest in possession, but when the seizure is made it relates back to the time of the forfeiture, excepting when the statute has expressed a different intent."

And this Court held in *Thornton vs. Schreiber* (124 U. S., 612) and *Bolles vs. Outing Co.* (175 U. S., 262) that § 4965 does express the intent that no forfeiture occurs unless and until the goods are *found* in possession.

In *Galveston, &c., R. R. Co. vs. State*, 81 Texas, 596, a statute provided that if a railroad was not completed within a certain time, its franchise would be forfeited. The Court said:

"It is universally held as a general rule that forfeiture of the franchise of a corporation cannot be claimed in a collateral proceeding merely because a ground of forfeiture may exist. The forfeiture must be declared in a judicial proceeding instituted for that purpose."

* * * * * *

"In cases where such words are employed, the uniform construction is that they prescribe a ground of forfeiture and that the manner must be by a judicial proceeding instituted for the purpose."

In *Minneapolis, etc., R. Co. vs. Duluth R. Co.*, 45 Minn., 104, it was held that where lands were granted to a railroad company upon certain conditions subsequent, such grant was not forfeited under the statute by the mere breach of conditions, but only by some affirmative action on the part of the State after the breach.

In *Tracy vs. Corse*, 58 N. Y., 143, at p. 149, the N. Y. Court of Appeals said:

"Whatever may be the true view as to the time when the forfeiture takes place, it is by the judgment alone that it can be ascertained and determined. If the government may be deemed to have an inchoate title from the time the offence is committed, it is not consummated until after a judicial condemnation. And, if after a seizure the possession is abandoned by the government, and a decree of forfeiture is not obtained, the title and the right of possession is in the original owner. This is, I think, a fair deduction from the authorities (*Slocum vs. Mayberry*, 2 Wheat., 1; *Gelston vs. Hoyt*, 3 *id.*, 246; *U. S. vs. Grundy*, 3 Cranch., 350; *Same vs. 1,960 Bags of Coffee*, 8 *id.*, 398; *Caldwell vs. U. S.*, 8 How., 366-381).

The General Term of the New York Court of Common Pleas, following *Tracey vs. Corse*, held that an act which exposed goods to forfeiture at suit of the Federal Government did not divest the owner's title to them, but that the goods were his property except as against the United States and as to the United States even they continued his property until judgment of forfeiture duly rendered.

Stark vs. Grant, 42 N. Y. St. Rep., 36.

"When a forfeiture is provided for upon a breach of any contingency, the forfeiture is generally held not to be complete, so as to vest the property in the preson to take by the forfeiture without affirmative action on his part."

13 *Am. & Eng. Ency. of Law* (2d Ed.), 1077.

Upon the principles of the authorities cited, neither title to nor right of property in infringing sheets

under Sec. 4965 vests until adjudication of forfeiture by the judgment of the Court. When such an adjudication is made, perhaps it may also be determined that the forfeiture occurred at some prior date, but, as was said in *Tracey vs. Corse (supra)*, it is by the judgment alone that forfeiture is ascertained and determined, and the title is not consummated until there is a judgment of forfeiture.

No action of Replevin can be maintained unless the plaintiff has the right of property or of possession at some time before commencing the action, otherwise he cannot make the requisite affidavit.

Under this caption we show that when the action is brought the plaintiff has no title of any kind to the property in question. He can obtain title only by a final judgment in his favor, and until then he has no right of possession, and his title and right of possession is subject to the defendant's right to counterbond.

The action of Replevin or "action to recover a chattel" in the State of New York is regulated by the New York Code of Civil Procedure, Sections 1689 to 1728.

The material provisions of the Code are, briefly stated:

(1) The writ is based on the plaintiff's affidavit, in which he must state that he *is*, viz., at the time of making it, the *owner* of the chattel or *is* entitled to the possession of it.

(2) The affidavit must be delivered to the sheriff when the summons is issued or afterwards, but not before.

(3) The cause of action is for the recovery of a chattel, *or its value*, with damages for the detention, and the cause of action must have accrued at some time before the action is commenced.

(4) The sheriff who seizes the chattel may deliver it to the plaintiff, if he has given an undertaking.

(5) But *the defendant may retain* the chattel, if he gives an undertaking to respond for its value.

(6) The judgment awards the chattel to the plaintiff, *unless the defendant has counter-bonded*, and, in that case, the plaintiff can recover only its value.

Code Civ. Pro., Sec. 1694, provides :

" The plaintiff may, *when the summons is issued, or at any time afterwards*, and before the service of a copy of the defendant's answer, or, where judgment is taken by default for want of an appearance or pleading, before the entry of the final judgment, cause the chattel, to recover which the action is brought, to be replevined by the sheriff of the county where it is found. For that purpose, *he must deliver to the sheriff an affidavit* and a written undertaking, as prescribed in the following sections of this article, with a written requisition, indorsed upon or annexed to the affidavit, and subscribed by his attorney, to the effect that the sheriff is required to replevy the chattel described therein. The requisition may be directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the chattel is found. It is deemed the mandate of the Court " (italics ours).

Code Civ. Pro., Sec. 1695, subd. 1, 2 and 3, provides :

" The affidavit to be delivered to the sheriff, as prescribed in the last section, must particularly describe the chattel to be replevined ; and must contain the following allegations :

" 1. That the plaintiff *is* the *owner* of the chattel or *is* entitled to the *possession* thereof by virtue of a special property therein ; the facts with respect to which must be set forth.

" 2. That it *is* wrongfully detained by the defendant.

" 3. The alleged cause of the detention thereof, according to the best knowledge, information and belief of the person making the affidavit " (italics ours).

A right to possession at the time of commencing the action is indispensable.

Wood vs. Orser, 25 N. Y., 348.
Easterly vs. National Exchange Bank, 3 T. & C. (N. Y. Supreme Ct.), 366.
Fulton vs. Fulton, 48 Barb., 581.

In *Wood vs. Orser*, cited above, the Court said :

" But, in order to maintain replevin, the plaintiff must show a right *to have delivery of the property at the time of the commencement of the suit* " (italics ours).

" The purpose of the action of replevin is the recovery of specific personal property. * * * To maintain the action the plaintiff must show that he is entitled to the *possession* of the property *at the commencement of the action.*"

Wheeler vs. Vandeveer, 88 Hun (N. Y.), 233, 235.

Plaintiff below attempted to comply with the Code requirements in respect of property or possession by the affidavits of his manager, Mr. Schutze, who deposed (marg., p. 100 and marg., p. 113) :

" That the above-named plaintiff (Werckmeister) *is the owner* of the chattels hereinafter particularly described, which are in the possession of the above-named defendant, as hereinafter stated."

Then follow the reasons for this statement. Among which is " *On information and belief* that said defend- " ant is in possession * * * of twenty-five thou- " sand (25,000) copies of said copyrighted painting " prepared in violation of plaintiff's copyright " (marg., p. 115 ; see, also, marg., p. 102), and then follows marg., p. 103 and p. 116) that by virtue of the U. S. Statutes every one of said copies " has become for- " feited to the plaintiff and *is* and they *now are* his " property."

To maintain either of the quotations, title to the sheets must have vested in Weckmeister *before* the affidavit was made. The only prior date at which title could have vested in plaintiff was the day when defendant's incriminating act was committed. There was no date between that date and the judgment when title could have vested. Without title there was no right of possession.

To become forfeited the sheets must have been en-

graved, etched, worked, copied, printed, published, dramatized, translated or imported, or with knowledge have been sold or exposed for sale, by the defendant (see Sec. 4965). But there was no showing in Mr. Schutze's affidavits that any of those things were done respecting any of the sheets alleged to be in the possession of the defendant, or any other similar sheets, excepting that they had been " prepared in violation of plaintiff's copyright and made at said defendant's direction by the American Lithographic Company of New York City wrongfully, &c." (marg., p. 115), and in respect of 1010 sheets that they had been " prepared in violation of plaintiff's copyright—and which were made and sent to the Deuther Manufacturing Company at the direction and request of said American Lithographic Company wrongfully, etc." (marg., p. 102).

Code Section 1696 provides that the plaintiff's affidavit, on which the writ is based, if made after the service of the summons, must show that the plaintiff was the owner or entitled to the possession of the chattel *at the time the action was commenced.* The section is as follows :

" § 1696. Contents of plaintiff's affidavit.

" But where the affidavit is made after the service of the summons, the allegations, required to be inserted therein by subdivisions first and second of the last section, must be to the effect, that the plaintiff, *at the time of the commencement of the action*, was the *owner* of the chattel, or was *entitled to the possession* thereof by virtue of a special property therein ; and that it was then wrongfully detained by the defendant, as prescribed in those subdivisions " (*italics ours*).

By section 1703 the defendant may except to the plaintiff's sureties, or

The defendant may *reclaim* the chattel.

Section 1704 provides :

§ 1704. When defendant reclaims chattel.

The defendant, if he does not except to the plaintiff's sureties, as prescribed in the last section, may, within the time allowed to him for such an exception, serve

upon the sheriff, a notice that *he requires a return of the chattel replevied.* With the notice, he must deliver to the sheriff the following papers :

1. An affidavit, containing an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking, executed by at least two sureties, to the effect that they are bound, in a specified sum, not less than twice the value of the chattel, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death ; and for the payment to him of any sum which the judgment awards against the defendant.

Within three days after serving a notice, requiring a return of the chattel, as prescribed in this section, the defendant must serve upon the plaintiff's attorney notice of the justification of the sureties to the undertaking."

If the defendant gives his undertaking and his sureties justify, the sheriff *must immediately deliver the chattel to the defendant.* This is provided for by Section 1706.

" § 1706. When and to whom sheriff to deliver chattel :

" If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose ; or if he makes default in serving notice of the justification of his sureties, or in procuring the allowance of his undertaking ; or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking ; the sheriff must, except in the case specified in section 1709 of this act, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, makes default in serving notice of justification, or in procuring the allowance of his undertaking ; *or if the defendant, after he has required the return of the chattel, duly procures the allowance of his undertaking ; the sheriff must immediately deliver the chattel to the defendant.* When the chattel is delivered by the sheriff to either party, as prescribed in this section, the sheriff ceases to be

responsible for the sufficiencies of the sureties of either party; until then, he is responsible for the sufficiency of the sureties of the plaintiff or of the defendant, as the case may be."

The action is then tried. The owership or the right to possession of the chattel at the time the action is commenced is the material issue of the action, and is required to be pleaded by Section 1720.

" § 1720. How title stated in pleading.

" An allegation, in a pleading interposed by either party, to the effect that the party pleading, or a third person, was, at the time when the action was commenced, or the chattel was replevied, as the case may be, the owner of the chattel, or that it was then his property, is a sufficient statement of title, unless the right of action or defense rests upon a right of possession, by virtue of a special property; in which case, the pleading must set forth the facts, upon which the special property depends, so as to show, that at the time when the action was commenced, or the chattel was replevied, as the case may be, the party pleading, or the third person, was entitled to the possession of the chattel,"

The form of the judgment is prescribed by Section 1730.

The judgment does not necessarily award the chattel to the plaintiff. *If the defendant has counterbonded, he retains the chattel and the plaintiff recovers only its value in case the plaintiff succeeds.*

A judgment of forfeiture with or without relation back cannot be rendered in an action of replevin under the New York Code.

Section 1730 of the Code prescribes the form of judgment. The material part is as follows :

" § 1730. Contents of final judgment, docketing, etc.

Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his

damages, if any. If a chattel recovered was not replevied, or if, after it was replevied, it was delivered to the defendant, or to a person not a party, as prescribed in this article, the final judgment must also award to the plaintiff the sum fixed as the value thereof, to be paid by the defendant, if possession thereof is not delivered to the plaintiff."

That does not provide for a judgment of forfeiture. There can be no forfeiture when the delivery (or forfeiture) to the plaintiff of the forfeited thing is *optional* with the defendant. To defeat the forfeiture the defendant has merely to counterbond, and, if the defendant fails in the action, he pays only the value. This has been so explicitly held, as will appear below :

The form of judgment does not provide for *an adjudication* that the defendant had committed an act, *i. e.*, had engraved, etched, etc., or sold or offered for sale, etc., by reason whereof the forfeiture occurred, nor can it adjudge that the things claimed to be forfeited are in possession or found in possession of the defendant, all of which must concur to warrant a determination of forfeiture. The replevin action may proceed and judgment may be rendered without the chattels being taken by the sheriff at all. The object of the replevin action is to recover a chattel *or its value*, the title to which may incidentally be tried.

The above argument is supported by ample authority.

It has been held in three cases in the Third Circuit that Section 4965 cannot be enforced by an action under the statutes in Pennsylvania regulating replevin.

Falk vs. Curtis Pub. Co., 102 Fed. Rep., 967, was an action in *assumpsit* to recover the *penalties*. Two writs had been issued simultaneously, a writ of *replevin* and a summons in the *assumpsit* case. Judge McPherson ruled that no penalty was recoverable except for such sheets as might have been found in the defendants' possession for the purpose of forfeiture and condemnation, and directed judgment for the defendant. In considering how that anterior finding in possession is to be established, he considered the question

of replevin as a means to that end, and intimated a doubt whether the action of replevin can be used for that purpose, giving his reasons for such finding.

On appeal to the Circuit Court of Appeals, that Court said :

" that the forfeiture arises, not on the subsequent finding by a jury, but on an actual finding of sheets in the defendant's possession, is evidenced by the fact that the finding specified in the act refers to an act then being carried on, viz., ' either printing,' or to an existing condition, viz., ' exposed to sale.' " * * *

" *If there was no forfeit when the action began, it follows there was no existing right of action to recover the fruit of forfeiture ; for an action is the prosecution of an existing right. There must be finding before there is forfeiture ; there must be forfeiture before the right accrues to sue for the forfeited penalty.*" (Italics ours.)

Falk vs. Curtis Pub. Co., 107 Fed. Rep., 126–128 (decided Feb., 1901 ; C. C. A., 3d Circuit).

That action was not to forfeit the sheets but for the *penalty* of one dollar for each sheet found in the defendant's possession, but Judge McPherson's ruling was affirmed.

In *Rinehart vs. Smith*, 121 Fed. Rep., 148, Judge McPherson held that the common law action of replevin is not a proper remedy by which to enforce the forfeiture provided by Section 4965. *The defendant had given a claim-property (Replevin) bond under the* Pennsylvania practice and retained the offending articles, which thereby became, according to the Pennsylvania law, his indefeasible property. Judge McPherson said (p. 148) :

" They cannot be forfeited now, even if such a result had ever been attainable in an action of replevin ; and therefore, as it seems to me, the suit should be dismissed, because its only object cannot possibly be reached. The act of Congress gives no right to sue for the value of the articles, or damages for their detention, and in Pennsylvania nothing else can now be recovered."

N. Y. Code, Section 1740, quoted above, makes exactly the same provision for counter bonding.

In *Gustin vs. Record Publishing Co.*, 127 Fed. Rep., 603, Judge McPherson went into the question more fully than in either of the above cases and again held as above, although the Pennsylvania practice act had then been amended so that the property of a defendant who gave a claim-property bond was not thereby rendered indefeasible, as the plaintiff had a right to obtain possession in case he succeeded upon the trial. Judge McPherson held that notwithstanding this change, replevin was not a proper remedy, and said (p. 604) :

"But there are other reasons why the Pennsylvania action of replevin is an inappropriate remedy. First, it is well settled in this state that replevin cannot be maintained without showing a general or special, an absolute or a qualified, property in the plaintiff *at the beginning of the action*, together with the right of immediate possession (*Lake Shore Ry. Co. v. Ellsey*, 85 Pa., 283 ; *Strong v. Dinniny*, 175 Pa., 586, 34 Atl., 919). And this is the rule in other jurisdictions also. 'The plaintiff must show a general or special property in the goods replevied, and when the issue raised is one of title he must prove a title on which to base a lawful possession' (20 *Amer. & Eng. Enc. of Law*, 1054, and cases cited in the notes). Neither of these requirements is possessed by a plaintiff who is seeking to forfeit the defendant's property in an action of replevin under section 4965. *When the action is brought the plaintiff has no title of any kind or degree to the property in question. He can only obtain title by a final judgment in his favor, and until then he has neither right of property nor right of possession.* If no claim property bond is given, the right of possession is in the marshal, who holds the goods by virtue of his writ while the question of forfeiture is being fought out. This is one fundamental difference between the Pensylvania action of replevin and the remedy which is needed to make section 4965 effective." (Italics ours.)

He further said (p. 605) :

"*No such thing as a judgment of forfeiture or a judgment for a penalty is known to the practice in this*

state, and without further legislation neither can be entered on a verdict in replevin. (Italics ours.)

"I think the court is amply justified, therefore, in holding that the action of replevin in Pennsylvania is not suited to carry the load that is now sought to be imposed upon it. The plaintiff who seeks to use it to vindicate the rights that are given him under section 4965 finds that he cannot even lawfully issue the writ, for he has neither right of property nor right of possession. If he proceeds, however, and directs the writ to issue notwithstanding the law and the practice, he cannot take possession of the goods, for the defendant may give bond (even since the act of 1901), and retain the property until final judgment, with the power of disposal during that period. Even if this further difficulty be surmounted by the defendant's failure to give the bond, the plaintiff is no better off, for he cannot obtain title to the goods, which have never yet belonged to him, nor the right to possess them, until he obtains a judgment of forfeiture; and no such judgment has ever been known in this form of action. His right to the penalty is so intimately involved with his right to forfeit that no penalty can be recovered if no forfeiture can be entered, to say nothing of the fact that judgment for a penalty is as much unknown in the action as a judgment of forfeiture. I am neither competent nor inclined to reconstruct this well-known form of action by violating its long-established rules. If I may repeat the suggestion that was made in Rinehart vs. Smith, Congress would do well, I think, to settle the perplexities that have beset this subject for many years, and to provide a uniform and appropriate remedy expressly adapted to the enforcement of the unusual rights that are given by the section now under consideration."

Judge McPherson's reasoning has never been questioned.

It was followed in the same circuit in *Hills vs. Hoover*, 142 Fed. Rep., 904 (Jan., 1906).

In *Morrison vs. Pettibone*, 87 Fed. Rep., 330 (decided May, 1897, in Illinois), a replevin action was brought under Section 4965. Judge Seaman held somewhat doubtfully that replevin would lie "for the purposes of this motion at least." The motion was to set aside a verdict in favor of the plaintiff. Judge McPherson re-

ferred to this opinion in *Falk vs. Curtis Pub. Co.*, but did not agree with it. We do not think that the hypothesis as to the construction of the word "forfeit" (p. 332) is warranted by the terms of the statute.

In *Walker vs. Globe Newspaper Co.*, 130 Fed. Rep., 593 (Dist. of Mass.), it was recently held that U. S. Rev. Stat. § 4964 does not authorize an action at law to recover damages. The judgment was reversed by the Circuit Court of Appeals (140 Fed. Rep., 305), where it was held that an action on the case might be brought to recover damages for infringement of a copyright, notwithstanding the U. S. Rev. Stat. did not authorize such an action.

However that may be, an action on the case cannot be brought by a private person in the State of New York under its Code for the forfeiture of personal property. There is only one form of civil action (Code, Section 3339). Action of forfeiture of property can be brought only in the name of the people, Section 1984, and such forfeitures occur, so far as we are aware, only in cases of treason, Sections 1982 and 1984, and there is no provision for seizures.

Under the decision of this court in *Bolles vs. Outing Co.*, 175 U. S., 262-266, it would seem that the forfeiture of sheets and the penalty for the same found in possession must be recovered in one action. Can it be said that a *penalty* can be enforced by a replevin action? Such an action must be one peculiar to the statute and must, as suggested by Judge McPherson, be begun by a lawful writ to seize the offending copies and a judgment prayed that the copies so seized shall be forfeited and the penalty thereon recovered. Such an action is, in its nature, entirely different from a replevin action.

The Circuit Court has No Power to Mould or Alter a State Writ or Proceeding So as to Adapt It to a New Procedure Not Contemplated By the State.

The Powers and authority of the Circuit Courts and of the judges thereof are limited by the Statutes of the United States.

Cary vs. Curtis, 3 How., 236.
Scott vs. Sandford, 19 How., 393.

Sec. 914, R. S., provides:

"The practice, pleadings, and forms and modes of "proceeding in civil causes, other than equity and ad- "miralty causes, in the circuit and district courts, "shall conform, as near as may be, to the practice, "pleadings and forms and modes of proceeding ex- "isting at the time in like causes in the courts of rec- "ord of the State within which such circuit or district "courts are held, any rule of court to the contrary "notwithstanding."

Section 914 relates only to practice, pleadings and forms and modes of proceeding, and does not include the issuance of *writs*.

The powers of the courts or judges to issue *writs* is conferred by other sections. Thus by Section 915, R. S., a plaintiff in a common law case in the circuit and district courts is entitled to "similar remedies, by "attachment or other process, against the property "of the defendant, which *are now* provided by the "laws of the State in which such court is held" and by Section 916, R. S., writs may issue for the collection of judgment and the laws of the State where the court is held are adopted in respect of such remedies.

But both Sections 915 and 916 adopt only such State laws in respect of attachment and execution as were in force at the time of the enactment of sections 915 and 916, viz., June 1, 1872, and confer power on

the Federal Courts to adopt later State legislation by " general rule."

Riggs vs. Johnson, 6 Wall., 166.

Section 917 R. S. conferred on the Supreme Court the power " to prescribe from time to time the forms of writs and their process—to be used in suits in equity or admiralty by the circuit and district courts."

In the case at bar the Circuit Court of Appeals relied on Section 716 for the authority of the Circuit Court to issue a writ for the seizure of the offending sheets (Rec., marg., p. 141).

We submitt that the Circuit Court derived no authority for the writ from that section. If that section does not support the writ no other does.

In respect of Writs, Section 716, R. S., provides:

" The Supreme Court and the circuit and district " courts shall have power to issue writs of *scire facias.* " They shall also have power to issue all writs not " specifically provided for by statute, which may be " necessary for the exercise of their respective jurisdic- " tions, and *agreeable to the usages and principles of law.*" (Italics ours).

This statute was originally enacted September 24, 1789, Chapter 20, Section 14, Vol. 1, page 81, and then included *habeas corpus* and was amended March 2, 1793, Chapter 22, Section 5, Vol. 1, page 334, to include *ne exeat.*

It would seem therefore that the *writs* which a Circuit Court may issue in *common law actions* are confined to those which are " agreeable to the usages and principles of law." This cannot refer to the common law, because there is no common law in the United States other than the common law of the State where the Federal Court sits.

" Agreeable to the usages and principles of law " must therefore mean *agreeable to the usages and principles of the laws of the State where the Federal Court is sitting.*

Accordingly, in *Stewart vs. Justices of St. Clair County Court*, 47 Fed. Rep., 482, in Missouri, decided 1891, Judge PHILLIPS, in a proceeding of *mandamus* to compel the respondents to make an assessment and levy a tax, the question being whether or not *mandamus* might issue when the writ of *fi. fa.* is barred, said in definition of the words "agreeable to the principles and usages of law."

"By this is meant the mode of process employed in the State where the United States Circuit Court sits."

In *Riggs vs. Johnson County*, 6 Wall., 166 (decided 1867) where nearly the same question was involved, Mr. Justice CLIFFORD, writing the opinion, said (p. 190):

"Executions, it is admitted, may be issued by the "Circuit Court, but the power of such court to issue "the other writs necessary to the exercise of jurisdic- "tion, is equally clear, with the single restriction that "the writ, and the mode of process, must be *agreeable* "*to the principles and usages of law.* Usages of law, "and not of the common law, it will be observed, are "the words of the provision, which, doubtless, refers "to the principles and usages of law as known and "understood in the State Courts at the date of that "enactment."

And further said, immediately following the quotation, that in view of the difference in the different States of forms of process, mesne and final, it was the intention of Congress that the forms of writs and executions and the modes of process and proceedings in common law suits should be the same as they were at that time in the courts of the respective States, and instead of framing forms and prescribing modes of process, Congress adopted those already existing and in use in the respective States, "not as State regulations, but as the rules and "regulations prescribed by Congress for use in the "several circuit courts." Thus adopted by Act of Congress, they became the permanent forms and

modes of proceeding, and continued in force "wholly unaffected by any subsequent State legislation," and alterations can only be made by Congress or by the Federal Courts, "acting under the authority of an Act of Congress," which authority was conferred, as already noted, by Sections 915 and 916 when exercised "by general rules."

The Chief Justice and two Associate Justices dissented, but not on the point covered by the above quotations, and their remarks rather confirm the view therein expressed.

While the writ of replevin and proceedings in a replevin action authorize a taking by the Sheriff, that taking is preliminary to a judgment *determining the title and possession* of the property taken and awarding damages for the value thereof in lieu of the delivery and damages for the detention. It has never been used to establish a condemnation and forfeiture of property and the proceeding and *the prescribed form of judgment* are not adapted to that end.

Section 716, therefore, gives no authority to the Circuit Courts to adapt the State proceedings in Replevin, its writ and its peculiar form of judgment to a seizure and judgment of forfeiture under Section 4965.

If penalties under Section 7 of the Act of 1831 cannot be recovered in a suit in equity, as was held by this Court in *Stevens vs. Gladding*, 17 How., 447–454, and *Callaghan vs. Myers*, 128 U. S., 617–663, it is difficult to see how a forfeiture can be enforced in an action of replevin, and for an analogous reason, as expressed in the Gladding case, that "courts of equity do not enforce forfeitures by an exercise of their ordinary jurisdiction."

Section 4965 Gives No Right of Seizure.

A part of the said statutory proceeding of replevin, *viz.:* that part which embraces the preliminary taking, cannot be used for the purpose of establishing condemnation and forfeiture, irrespective of the remainder

of the proceeding, because Section 4965 does not authorize any *seizure* of the infringing sheets.

The United States statutes expressly authorize the search and seizure of vessels and merchandise liable to forfeiture for violation of the revenue laws, and the seizure of property liable to condemnation for violation of the Internal Revenue Laws (see R. S., Secs. 3059 and 3166, *et al.*), by virtue of which a present seizure, to be followed later by a judicial condemnation and forfeiture, is lawful. But no right of seizure, or even visitation of premises, is given in the case of sheets infringing a copyright.

As the Circuit Court has no power to frame or adopt a new writ, not known to the State law or prescribed by the Supreme Court, it follows that it cannot in any case mould, alter or adopt an existing writ even to aid its jurisdiction.

Congress should supply the omission by authorizing a preliminary seizure of infringing sheets and a writ to enforce the same.

It may be that the Circuit Court may even now by bill in equity, injunction and writ of *sci. fa.* accomplish the forfeiture, but this need not be discussed. Although the State writ of *sci. fa.* has been abolished (Code, Sec. 1983) it may be that U. S. Rev. St., Sec. 716 preserves it.

Omissions in a statute are not to be supplied by interpretation, because that would be to make laws.

Denn vs. Reid, 10 Pet., 524.
U. S. vs. Breed, 1 Sumn., 160.
Smith vs. Rines, 2 Sumn., 354.

As Judge STORY said in the last case :

"It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation."

If this Court is precluded from considering the legality of the replevin proceedings as raised by defendant's motion to set aside the verdict, it can do so on the rulings admitting the replevin proceedings.

If the writs of replevin were not warranted in law, then the seizures by the respective Marshals were illegal and were acts of violence. The writs themselves being illegal and the affidavits on which they were granted, and the returns endorsed on the writs by the respective Marshals were incompetent as evidence and a judgment of forfeiture could not lawfully be founded thereon.

The case is not within the rule of *Adams vs. New York*, 192 U. S., 585–597. There the seizure of the policy slips under a search warrant was legal under a law of the state, and the question was as to the admission in evidence of other private papers seized at the same time, and which were relevant as showing Adams' knowledge of the custody of the policy slips. This court held it was immaterial how the private papers were obtained.

But in the case at bar, the judgment depends upon the evidence furnished by illegal papers, *viz.*, affidavits, writs and Marshals' returns endorsed thereon, which had no legal *status*, which did not prove themselves, and were nullities. The papers were obnoxious in themselves, not merely in the manner of getting them.

The Constitutional Question.

If our main contention above is sound, the Marshals' proceedings would seem to have been in violation of defendant's rights under the Fourth Amendment to the Constitution, as they constituted an unreasonable search and seizure, and also in violation of defendant's rights under the Fifth Amendment as a taking of property without due process of law.

Boyd vs. U. S., 116 U. S., 616, at p. 633.

Whether or not a corporation, since the decision of this court in *Hale vs. Hinkel*, 201 U. S., 43, can invoke the said constitutional provisions as a shield against the compulsory giving of evidence against itself in penal cases, which are not within the principle of governmental supervision and control expounded in that case, is made doubtful by the remark of the Circuit Court of Appeals in *American Lithographic Co. vs. Werckmeister*, 146 Fed. Rep., 378, as follows: "The "Supreme Court has since held that corporations are "not under the protection of the Fifth Amendment "(Hale vs. Henkel)."

But in view of the length to which our discussion on other points has extended, and, also in view of our expectation that the constitutional question as it affects corporations in cases not involving the principle of *Hale vs. Henkel*, will be raised in another case, we do not discuss it here or present it for determination.

The judgments of the Circuit Court and of the Circuit Court of Appeals should be reversed and a new trial ordered with costs.

WM. A. JENNER,
Of Counsel for Plaintiff-in-Error
(defendant below).

Supreme Court of the United States.

No. 287.

AMERICAN TOBACCO COMPANY,
Plaintiff in Error
(Defendant below),

AGAINST

EMIL WERCKMEISTER,
Defendant in Error
(Plaintiff below).

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of Case.

This case comes to this Court upon a writ of error sued out by the American Tobacco Company to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States Circuit Court for the Southern District of New York, in favor of the defendant in error, entered on December 5, 1904, for infringement of copyright, whereby it was

> "Adjudged that the plaintiff have and retain and is entitled to the possession of one thousand one hundred and ninety-six (1196) sheets, each containing a copy of the plaintiff's copyrighted picture 'Chorus,' found in the possession of the defendant and replevied

by the United States Marshal, all as alleged in plaintiff's complaint, said sheets having been made in violation of plaintiff's copyright, and that the same are forfeited to the plaintiff and are of the value of $1,010.00, with costs" (Rec., p. 9).

The action was an action of forfeiture in nature and form similar to an action of replevin, maintained under Section 4965 of the Revised Statutes of the United States, which reads as follows:

> "If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale. *Provided, however*, That in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section

> shall be not less than one hundred dollars, nor more than five thousand dollars, and: *Provided, further*, that in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

The text of this section is that of the amendatory act of March 2, 1895 (53d Congress, 3d Session, Chap. 194; 28 Statutes at Large, p. 965).

The judgment was entered at the close of the trial by direction of the Court to the jury to find a verdict in favor of the plaintiff.

The questions in this case are closely related to those raised in the case between the same parties, No. 288, before this Court, the plaintiff having resorted, first, to an action to recover possession of the infringing sheets, and, after a finding of the sheets by the Marshal, secondly, to an action to recover the money penalty provided by the same statute. The issues in the two cases were the same.

The complaint alleged that the defendant in error purchased on April 2, 1894, of W. Dendy Sadler, an English artist, the copyright of an unpublished painting called "Chorus," designed and painted by him, a copy of which is found between pages 66 and 67 of the record, and that he obtained an assignment in writing from the artist of all his right, title and interest in any copyright obtainable thereon in the United States of America and in all other countries. It alleged that thereafter, on April 16, 1894, the defendant in error duly obtained statutory protection for his copyright in the United States, and thereafter began the publication of the

painting in this country and in foreign countries by the sale of copies thereof. It further alleged that the notice required by the statute had been properly inscribed upon every copy of the painting published by him, or on the substance upon which the copies were mounted; that at the time of the commencement of this action the American Tobacco Company was in possession, at its offices in New York City, and in the hands of its various agents, of 7,338 sheets, each containing a copy of the copyrighted painting prepared in violation of the plaintiff's copyright; that the defendant (below) caused said copies to be printed for it by the American Lithographic Company, and upon delivery thereof to it, published some of said sheets within one year previous to the commencement of the action; that 203 of such copies were at the commencement of the action seized by the Marshal and 993 copies were, after the commencement of the action, also seized by the Marshal in the defendant's possession, the latter at the place of business of the Deuther Manufacturing Company in Buffalo, in pursuance to writs of replevin. The complaint claimed a forfeiture of these sheets and demanded judgment for the delivery to plaintiff of all copies found in the possession of the defendant (Record, pp. 3 to 5).

The defendant's answer admitted that on or about June 26th the defendant had certain lithographed copies of a picture which had been made for it by the American Lithographic Company claimed by the plaintiff to be an infringement of his alleged copyright and admitted that certain copies of said picture were on June 26, 1902, at the instance and by the procurement of the plaintiff, seized by the Marshal and carried away by him and that their number was 113.

The answer also set up two distinct defenses, one being that the plaintiff was neither the author nor the assign of the author when he applied for copyright protection, and the other that the copyright

had been abandoned by the public exhibition of the painting "Chorus" at the Royal Academy of Arts, in London, England, from the first Monday of May to the first Monday of August, 1894, without any notice of copyright inscribed thereon, it being alleged, in the answer that such exhibition and publication was with the knowledge, consent and permission of the plaintiff and of said Sadler, the author and proprietor of said painting.

The defense of abandonment by the publication of the painting was first raised by a plea interposed by the American Lithographic Company and the American Tobacco Company, in an equity suit of this plaintiff for injunction. The plea was sustained by the Circuit Court (Werckmeister *v.* American Lithographing Company, 126 F. R., 244), but that decision was reversed on appeal by the Circuit Court of Appeals (same parties, 134 F. R., 321; 68 L. R. A., 591).

This decision contains such an exhaustive review of the authorities that little will be added to it by our brief.

The depositions of Werckmeister, Sadler, Eaton and Alma Tadema are the same which were before the Circuit Court of Appeals upon rendering that decision in the equity case, overruling the defendants' joint plea. Since then the equity case has come to trial before the United States Circuit Court (HOLT, *J.*), where a perpetual injunction was awarded to the complainant (Werckmeister *v.* American Lithographic Co. *et al.*, 142 F. R., 827), and that decision has been affirmed by the Circuit Court of Appeals without rendering any opinion, because that Court, in the meantime, had passed upon all the important questions by sustaining the judgment in the present action.

The opinion of the Circuit Court of Appeals affirming the judgment of the Circuit Court in the present case is found on pages 79 to 81 of the record.

At the trial of the case plaintiff proved an oral agreement of sale of the copyright of the picture confirmed by a written memorandum:

> "I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200 (signed), W. Dendy Sadler, London, April 2, 1894."

Werckmeister and Sadler both testified that the copyright was intended to be conveyed for all countries. The picture was delivered to Werckmeister in Berlin, who returned it to the artist after he had prepared a copy of it. Thereafter, and subsequent to the date of the copyright certificate obtained by Werckmeister in the United States, the artist exhibited the painting in London and some years later sold it, informing the purchaser, however, that the copyright had been reserved.

It was further proved by the plaintiff that after the statutory requirements for obtaining copyright in the United States had been complied with by him, he put copies of the work on the market, marking each one with a notice in accordance with the statute.

The publication of copies of the copyrighted work by the defendant was proved by the admission in the defendant's answer and by the depositions of Eugene Eble (R., p. 39); Ludwig H. Schutze (R., p. 50); Thomas C. Miller (R., p. 40), and O. v. Schrenk (R., p. 40).

The letter of Mr. Parker, attorney of the plaintiff in error, written on June 27, 1901, to plaintiff's manager in New York, showed that the plaintiff in error was early advised of plaintiff's claims under the copyright, and that the infringement was deliberate (R., p. 55).

It further appeared by the testimony of Francis A. Wilson and O. *v.* Schrenk that the American Tobacco Co. ordered from the American Litho-

graphic Co. 25,000 of the infringing posters, lettered with the advertising inscription thereon, 5,000 unlettered and 100 on satin; that at the time of the replevin in New York, the American Tobacco Company had distributed 1,490 copies lettered and framed, 6,035 lettered only, and had at its office not lettered 113 on satin. There were also in existence 16,475 copies lettered, 4,900 not lettered and 87 on satin and at the office of the Deuther Manufacturing Co. 1,010 lettered copies for framing (R., p. 56).

The finding in the possession of the defendant of 203 copies, at its office 111 Fifth avenue, New York, was proved by the testimony of O. *v.* Schrenk and by the certificate of the Marshal endorsed on the writ of replevin (R., p. 61). The further finding of 993 additional copies in the possession of the defendant at the office of the Deuther Manufacturing Co. in Buffalo, was proved by a stipulation, Exhibit J (R., pp. 47 to 48), and by the replevin papers. That the possession of these posters was in law, the possession of the plaintiff in error, and not the possession of the Deuther Manufacturing Company was a necessary conclusion from the words of the stipulation, that Lorenz Deuther would testify that these 993 copies were held by his company as framers of these pictures only "in pursuance to said directions and subject to the direction and control of the American Tobacco Company and that said Deuther Manufacturing Company neither had, nor has, any interest in said prints or pictures whatever." The replevin papers showing the seizure of the 993 copies in Buffalo, with the Marshal's return, were also offered in evidence (R., p. 56 to 60, inc.).

At the end of the trial counsel agreed that the number of copies seized was 1,196 (R., p. 53, fol. 92).

The Errors Assigned.

The first assignment of errors alleges that the defendant in error was not the assign of the author of the picture and had no right to secure statutory copyright. The second, third, fourth, fifth aud sixth assignments of error are all based on the contention that testimony concerning the restricted character of the exhibition of the picture in London should not have been received. The eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth assignments of error are based on the contention that the writs issued by the Court for the seiz ure of the infringing sheets were illegal process. The fifteenth assignment of error claims all the foregoing grounds; also that there was a lack of proof of plaintiff's allegations and that the action was a criminal action, and no intent to commit a criminal act had been proven. The sixteenth assignment of error claims error in the refusal of the Court to set aside the verdict upon defendant's motion for a new trial. On this motion for a new trial the defendant claimed for the first time that replevin under the statutes of the State of New York was not an appropriate or lawful remedy for the taking possession of the infringing sheets. That objection had not been taken when the several replevin papers were offered and received in evidence during the trial.

In addition thereto the tenth assignment contains a claim that a statement handed by Wilson to plaintiff's witness Schrenk, which was offered in evidence, was incompetent.

ARGUMENT.

POINT I.

Both in England and in the United States an absolute property in unpublished intellectual creations of art and literature is recognized which no one can take from the producer without his consent.

Banker vs. *Caldwell*, 3 Minn., 94.
Palmer v. *De Witt*, 47 N. Y., 532.
Tabor vs. *Hoffman*, 118 N. Y., 30.
Tompkins v. *Halleck*, 133 Mass., 32.
Ockenholdt vs. *Frohman*, 60 Ill. App., 300.
Cooley on Torts, para. 354.
Morgan, Law of Literature, para. 386.
Shortt, Law of Literature, para. 48.
Bell, Law of Scotland, para. 1356.
Drone on Copyright, p. 103.
Parton vs. *Prang*, 3 Clifford, 537; Federal Cases, No. 10,784.
Goldmark v. *Kreling*, 35 F. R., 661.
Aronson vs. *Baker*, 43 N. J. Eq., 365.
Press Pub. Co. v. *Monroe*, 51 L. R. A., 353 (and see the extensive note to this case).
Am. & Eng. Ency. of Law, 2d Ed., Vol. 7, p. 517.

In the celebrated case of *Donaldsons* v. *Becket*, 4 Burrow's Reports, 2408, the judges of the King's Bench answered the question propounded to them by the House of Lords:

> "First, whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action

against any person who printed, published and sold the same without his consent? Yes, ten to one, that he had the sole right, and, eight to three that he might bring the action."

See also

Turner vs. *Robinson*, 10 Irish Chan. R., 510, 513.

Jefferys vs. *Boosey*, 4 H. L. Cases, 815, 867.

Prince Albert vs. *Strange*, 1 Mac. & G., 25.

POINT II.

This exclusive right of the author to control the publication of his work until by a publication it may be dedicated to the public is an incorporeal right, entirely disconnected from the substance in which the thought or mental creation may be embodied.

A copyright is property in notion, without corporeal, tangible substance.

Millar v. *Taylor*, 4 Burroughs, 2303.

Jefferys vs. *Boosey*, 4 H. L. Cas., 884, 888.

This property is a different and independent right, detached from the corporeal property, out of which it arises.

Stephens v. *Cady*, 14 How., 528.

Each of these is capable of existing and being owned and transferred independent of the other.

Stevens v. *Gladding*, 17 How., 447.

The ownership of the plates does not confer a right to reproduce the article from them.

Patterson vs. *Ogilvie Pub. Co.*, 119 F. R., 451.

Copyright is an intangible species of property, as the name implies.

Bryan vs. *University*, &c., 112 N. Y., 382, 386.

The word "copyright" is sometimes used indifferently to denote the statutory and the common law property in intellectual creations.

7 Am. & Eng. Enc. of Law, p. 512 (2d Ed.).

POINT III.

As property this right is assignable, irrespective of the substance.

There is no authority to be found for the contention of the plaintiff in error that the common law right of the artist was inseparably connected with the painting, and that without the latter it could not be assigned. Ever since the decision of

Prince Albert v. *Strange*, 2 DeG. & S. M., 652 (on appeal, 1 Mac. & G., 25),

it has been considered as well settled that the same rules apply to pictures, drawings and the like as to any other subject of copyright.

Burrow-Giles Litho. Co. vs. *Sarony*, 111 U. S., 53.

Werckmeister vs. *Springer*, 63 F. R., 808.

The point now made by counsel for plaintiff in error was once argued in the case of *Turner* v. *Robinson, 10 Irish Chancery Reports, 121*, where it

was disposed of by the Master of the Rolls with the argument that, if any physical property was necessary to uphold an assignment of the common law right of ownership, it was satisfied by a special property such as is transferred by bailment whenever the article itself is loaned to the transferee. This is very technical and curious reasoning, which does not grasp the nature of the right itself. The force of the argument which is made against upholding an assignment of the right without assignment of the substance, lies in the contention that the right cannot be exercised without having the substance. To that argument it is sufficient to answer that all which is needed in the transferee to overcome this objection is the opportunity of exercising his right, and, if that opportunity is furnished, there is no further necessary connection between the thing itself and the right to copy it.

In the present case the picture was loaned to the transferee for the purpose of enabling him to exercise the right, and he copied it. But opportunity of exercising a right is in law not a necessary foundation of its existence. There are many patents in existence which cannot be used because they conflict with existing patents; there are many rights in and to the soil which cannot be exercised on account of public easements controlling them; there are many rights possessed by persons incompetent to exercise them.

In the case of manuscripts it would be impossible to determine to which of them this incorporeal right should cling, should there be more than one as is often the case. This is likewise so in the case of lectures which are delivered orally, but may be written out by the students without imparting to them any right of publication as long as the lecture has not been published by the lecturer.

Bartlett v. *Crittenden*, 5 McLean, 32.
Duke of Queensbury v. *Shebbeare*, 2 Eden., 329.

Abernethy v. *Hutchinson*, 3 L. J. (Ch.), 209.
Keene v. *Kimball*, 16 Gray (Mass.), 549.
Nichols v. *Pitman*, 23 L. R. (Ch. Div.), 374.
Callaghan v. *Myers*, 128 U. S., 617.
Caird v. *Sime*, 12 Appeal Cases, 326.
Crowe v. *Aiken*, 2 Bissell, 208; Fed. Cas., No. 3441.
Story on Equity, Section 943.
Drone on Copyright, p. 99.
Palmer v. *DeWitt*, 47 N. Y., 532.

Again, it is well established in the case of letters that, although the receiver of the letter is the owner of the letter itself, he has no right to publish the same, which remains in the sender of the letter. This has always been the law in England and in this country.

Hope v. *Curl*, 2 Atkinson, 342;
Thompson v. *Stanhope*, 2 Ambl., 737;
Granard v. *Dunkin*, 1 Ball. & B., 207;
Perceval v. *Phipps*, 2 Ves. & B., 19;
Gee v. *Pritchard*, 2 Swanst., 402;
Palin v. *Gathercole*, 1 Colly. Ch. Cases, 565;
Oliver v. *Oliver*, 11 C. B., N. S., 139;
In re Wheatcroft, L. R., 6 Ch. Div., 97;
Lytton v. *Devey*, 54 L. J. Ch., N. S., 293;
Howard v. *Gunn*, 32 Beav., 462.

The same principles are recognized and applied in the American cases.

Denis v. *Leclerc*, 1 Mart. (La.), 159;
Folsom v. *Marsh*, 2 Story, 100;
Woolsey v. *Judd*, 4 Duer, 379;
Grigsby v. *Breckinridge*, 2 Bush (Ky.), 480;
2 Story Eq. Jur., pp. 946–948.

See also

Carte v. *Bailey*, 64 Me., 458;
Agawam Co. v. *Jordan*, 7 Wall., 583;
Holmes v. *Hurst*, 174 U. S., 82;
Mifflin v. *R. H. White Co.*, 190 U. S., 260;
Palmer v. *De Witt*, 47 N. Y., 532;
Werckmeister v. *Springer*, 63 F. R., 808;
Press Pub. Co. vs. *Monroe*, 51 L. R. A., 353.

POINT IV.

The assignment by Sadler, the artist, to the defendant in error conveyed the entire interest of the artist in the copyright, whether before or after publication.

A parol assignment would have been sufficient.

Callaghan v. *Myers*, 128 U. S., 617;
Lawrence v. *Dana*, 4 Cliff., 1;
Black v. *Allen*, 9 L. R. A., 433;
Belford v. *Scribner*, 144 U. S., 488.

The assignment of the common law copyright would also be presumed from a former assignment of a secured copyright for a term allowed by an existing statute which is afterwards amended so as to lengthen the term of protection.

Paige v. *Banks*, 13 Wall., 608.

A sale of the painting without the copyright, and again a sale of the copyright without the painting, could undoubtedly be made in England, which was at the time of the transaction a party to the Berne convention. Even before it acceded to that con-

vention, it was recognized by the English copyright statute that the author might sell the picture and reserve to himself the copyright, or *vice versa*, and that the assignee of the copyright was entitled to the statutory protection upon registering his title.

Cocks v. *Purday*, 5 Common Bench, 860;

Turner v. *Robinson*, 10 Irish Ch. Reps., 510;

Copinger on Copyright, 3d Ed., pp. 440 to 442; also p. 122;

Cumberland v. *Planche*, 1 Adolph & Ellis, 580.

Digest of the English Law of Copyright by Sir Jas. Stephen, published in Putnam, Question of Copyright, p. 198;

Act of 1842 (5 and 6 Victoria), Chap. 45, Sec. 2; also Chap. 68 of 25 and 26 Victoria (1862).

The wording of the instrument of assignment is so precise that it cannot be construed into a license merely. A license would involve the retention of an interest in the copyright by the artist.

In the recent case of *Mifflin* v. *R. H. White Co.*, 190 U. S., 260, this Court held that the copyright statute intended to refer to the same person by the words "legal assigns" and "proprietor."

The assignee of the copyright would be similarly regarded as entitled to register the copyright under the statute in England as the "proprietor." The English act defines the word "assigns" to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law or otherwise.

Lover v. *Davidson*, 1 C. B. (N. S.), 182; 5 & 6 Victoria, Chap. 45, Sec. 2;

Copinger on Copyright, 3d Ed., p. 177;

Macgillivray on Copyright, pp. 171–177.

POINT V.

The wording of the copyright statute of the United States does not support the claim that the copyright and the substance must be connected.

The phraseology of the statute is undoubtedly obscure; it has, however, never been held as regulating any existing common law rights, but as creating and conferring upon authors as a compensation for their contributions to the promotion of general knowledge the "exclusive right to their respective writings for limited times."

Carte v. *Bailey*, 64 Me., 458.
Holmes v. *Hurst*, 174 U. S., 82.
Wabash vs. *Pearce*, 192 U. S., 179, 186.

The words "completing, executing and finishing" are senseless unless they are understood to refer to the copies, and must be entirely disregarded. The author cannot obtain by statute the sole right of completing his work because he has it without the statute, nor could any assignee ever claim that by an assignment of the copyright he had obtained the sole right of completing an incomplete book, painting or composition.

POINT VI.

The exhibition of the picture at the Royal Academy was not a publication.

This matter was very carefully considered and decided, upon the same proofs which are before the Court in this record, by the United States Circuit Court of Appeals for the Second Circuit in the case between the same parties (The Amer. Lith. Co. being a codefendant) reported in Vol. 134, F. R., 321.

The proofs established beyond any question that the rule of the Royal Academy forbidding the copying of any pictures there exhibited was strictly enforced, that it was known to the exhibitors who relied upon it when they sent their works to the Royal Academy, and that it was brought to the attention of the public by the custodians of the pictures whenever any person made any attempt to copy. The exhibition was in every sense as private as it would be at the artists' studio. The criterion as to whether such an exhibition amounts to a publication or not, cannot lie in the persons who view the pictures, nor in the number of persons who see them, nor in the payment or non-payment of an entrance fee, but it must lie in the understanding which they have as to their right to copy the pictures exhibited and their physical opportunities to make use of such rights. The case is entirely different from that of a statue which is placed on a public square and which can be copied freely by anybody who sees it.

Abernethy v. *Hutchinson*, 3 L. J. (Ch.), 209;
Nichols v. *Pitman*, 23 L. R. (Ch. Div.), 374;
Caird v. *Sime*, 12 Appeal Cases, 326;
Parton v. *Prang*, 3 Cliff., 537;
Tompkins v. *Halleck*, 133 Mass., 32;
Palmer v. *De Witt*, 47 N. Y., 532;
Turner v. *Robinson*, 10 Irish Ch. Reps., 510;
Werckmeister v. *Springer Lith. Co.*, 63 F. R., 808.

The case of *Pierce & Bushnell Mfg. Co.* v. *Werckmeister*, 72 F. R., 54, is not an authority to the contrary, because that case was decided on the assumption that in the absence of any rule forbidding the copying of pictures, an exhibition would furnish a free opportunity to make copies and thus work an abandonment.

POINT VII.

The copyright statute does not require a notice on the original painting, but only on every copy of every edition issued.

This point has been so fully discussed by Judge Putnam in *Werckmeister* vs. *Pierce & Bushnell Co.* (C. C), 63 F. R., 455, and by Judge Holt in *Werckmeister* vs. *Amer. Lithographic Co.* (C. C.), 142 F. R., 827, that we need not add anything. The Court below concurred in the views expressed by them. On this point the decision of the majority of the Circuit Court of Appeals in the First Circuit in *Pierce & Bushnell Mfg. Co.* v. *Werckmeister*, 72 F. R., 54, differs, but the decision was by a divided court, and has been frequently criticised by the profession and legal writers since it was announced.

For the purposes of the present case it would seem to be immaterial whether or not the original picture is included in the words "in the several copies of every edition published," because clearly the statute cannot be construed to require a notice on the unpublished painting. The object of the statute requiring notice is to give notice to the public. The statutes refer only to the published edition, which is an edition offered to the public for sale or circulation.

Falk v. *Gast Lith. & Eng. Co.*, 54 Fed. R., 890, 894 (Shipman, *J.*).

Burrow-Giles Lith. Co. v. *Sarony*, 111 U. S., 53;

Snow v. *Mast*, 65 F. R., 995;

Am. & Eng. Enc. of Law, Vol. 7 (2d Ed.), p. 555.

Thompson v. *Hubbard*, 131 U. S., 123, 150;

Mifflin v. *White*, 190 U. S., 260.

POINT VIII.

After assigning the entire copyright in the painting the artist could not by any act on his part destroy the assignee's copyright.

After the artist had assigned the copyright he retained no right to make or sell copies of the painting, nor could he do any act which would frustrate his grant. This Court, in Paige *v.* Banks, held:

> "Paige could no longer do any act after such delivery for publication inconsistent with the absolute ownership of the publishers."
>
> *Paige* v. *Banks*, 13 Wall., 608, 615.

> "The fact that the two unpublished plays, after having been entered here, were published in England, would make no difference, unless that publication was with the consent of the plaintiff. No one would have the right to import and use them. Such consent, however, would be an abandonment of his rights, under our laws, and place him simply in the position of an ordinary English dramatist who had published his plays in his own country; but this consent must be affirmatively proved."
>
> *Drummond, D. J., in Boucicault* v. *Wood*, 2 Biss., 34; Fed. Cas., No. 1693;
>
> *Crowe* v. *Aiken*, 2 Biss., 208; Fed. Cas., No. 3441;
>
> *Palmer* v. *DeWitt*, 47 N. Y., 532;
>
> *Goldmark* v. *Krehling*, 35 Fed. Rep., 661.

The most important recent case on this point is *American Press Association* v. *Daily Story Publishing Co.*, 120 Fed. Rep., 766, in which the Judges of the Circuit Court of Appeals for the Seventh Circuit

agreed upon the proposition that title to copyright could not be lost by the theft of the manuscript or piratical publication of it, or even a publication permitted, but not directed by the owner of the copyright, Judge Jenkins saying (p. 768):

> "The copyright of the appellee was property, of which it could not be legally deprived without its consent. Title to copyright is no more lost by the theft of the manuscript or piratical publication of it, than is one's title to a horse lost by the stealing of it, or by the unlawful sale of it to a stranger. * * * So the question arises whether the publication by the appellant was in any sense with the consent of the appellee; and that, in turn, depends upon the question whether the *St. Louis Globe-Democrat*, wrongfully publishing the story without notice of copyright attached, was, in so doing, the agent of the appellee or its licensee. If the former, the appellant is justified; and, if the latter, it is without justification."

The majority of the Court held (Grosscup dissenting), that the licensee of the owner of the copyright, who had authority to publish only with the copyright notice attached, was not the agent of the owner of the copyright for the purpose of a publication in which the notice was omitted.

The utmost which can be claimed on behalf of the plaintiff in error in the present case is that the defendant in error knew that the artist intended to exhibit the painting at the coming exhibition of the Royal Academy. There is no proof in the case that he directed such exhibition or gave his express consent to it. All the parties who had anything to do with that exhibition regarded the exhibition as restricted, thus excluding the idea of any abandonment of the picture to the public for copying purposes. Such knowledge cannot imply any intention on the part of the defendant in error to allow the artist to abandon the copyright by a pub-

lic, unrestricted exhibition. So far as appears in the case, the appellant had no knowledge that the picture would be sold or offered for sale by the artist, and it would have been incumbent upon the defendant to prove such knowledge and consent in order to argue that the appellant was bound by that fact.

Abandonment always requires an intention to abandon, and in order to prove that defense, the proofs must establish such an intention, either by direct evidence or by a necessary inference from the facts.

Saxlehner v. *Eisner & Mendelson Co.*,
179 U. S., 19.

POINT IX.

The statute requiring notice cannot have any extra-territorial application.

If the notice indicated in the statute pointed of necessity to the United States as the country in which copyright protection was claimed, it might be argued that, the provision being general, it was meant to apply, although without apparent utility, to all countries. The form of notice, however, which is permitted by the statute: "Copyright, 1900, by A. B.," does not indicate to the public any claim of protection in the United States, except when used on works here. In Canada, in England and in other English-speaking countries, it would be easily misleading, inasmuch as intellectual property may be free in one country and protected in another. In Spain, France, Russia and all other countries where other languages prevail, the notice would be meaningless; it would not be understood, and, if understood by a few, it would not convey any useful information. And yet the statute makes a

strict compliance with the provision as to marking, an absolute requirement of the continuance of the copyright. Can it be for a moment supposed that the statute requires this absurdity, since its only object is to give notice of the copyright in the United States to the public of the United States?

It may well be that a publisher who causes his editions to be printed abroad and imports them here without the notice should lose his copyright, and he may also be reasonably required to prevent in this country the sale of unmarked copies published by him in a foreign country. As long, however, as such copies do not find their way to this country, their publication abroad is entirely innocuous and outside of the proper sphere of our legislation. It is a well known canon of construction of statutes that their literal meaning must give way to a construction which is in accordance with their objects and plain import. The latest deliverance of this Court upon this subject, we believe, is found in the recent case of Wabash Railroad Co. *vs.* Pearce, 192 U. S., 179, where Mr. Justice Brewer, speaking for the Court, said:

> "*In order to fully understand the force and scope of any statute or body of statutes, we must have regard to the conditions and circumstances for which the legislation was intended and under which it is to become operative. We are not narrowly to read the letter and ignore the state of affairs to which that legislation was intended and is applicable*" (*on p. 186*).

Among all the countries which have adopted copyright laws, the United States is the only one which has adopted the requirement of a notice upon every copy published by the owner. This provision is not recognized or understood in foreign countries, where the principle generally prevails that no one has the right to copy the intellectual product of another, and that everybody acts at his peril who takes that which has been originated by another. The appli-

cation of this provision requiring a copyright notice, to a piece of art in other countries, would be considered there a barbarism which no artist would allow, and would make copyright protection in the United States for pictures of foreign artists practically impossible. Rather than spoil his picture by a senseless notice in a foreign language the artist would forego his claim to property here which the law recognizes in such an unsatisfactory manner.

For these reasons, we submit, it must be held that the provision as to marking was not intended by Congress to apply to any works, but those published in this country. This point was not considered in the case in the First Circuit, 72 F. R., 54, above referred to.

POINT X.

The seizure of the sheets containing the illegal copies was not an illegal proceeding, nor an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments.

> "*Not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches therefore may be allowed, and if the thing sought be found, it may be seized.*"
>
> *Boyd* v. *U. S.*, 116 U. S., 616, 641.

> "*The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers.*"
>
> *Ibid.*, on page 623.
>
> See also *Adams* vs. *New York, 192 U. S., 585, 597.*

By the plain words of the statute the plaintiff has a right to take (by legal means) the infringing property. From the moment the law is violated he has an inchoate right of property therein which becomes absolute upon a subsequent judgment of forfeiture. That judgment dates his title back to the time the wrong was committed, and the word "found" in the statute is a limit of the place and condition of the articles only and does not postpone the time of the finding.

This, we understand, is the general principle of all actions of forfeiture.

> "*By the settled doctrine of this Court, whenever a statute enacts that upon the commission of a certain act, specific property, used in or connected with that act, shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.*"
>
> *U. S.* v. *Stowell*, 133 U. S., 1, 16;
> *Henderson's Distilled Spirits*, 14 Wall., 44, 56;
> *Gelston* vs. *Hoyt*, 3 Wheat., 311;
> *U. S.* vs. *Three Copper Stills*, 47 F. R., 495;
> *U. S.* vs. *Olsen*, 57 F. R., 585.

The decision in U. S. *v.* Stowell also discusses the bearing of the words, "found in the distillery," in the Internal Revenue Act, and the reasoning of the Court applies with great force to the word "found" in the Copyright Statute. The Court says (on pp. 17 and 18):

> "*The forfeiture, under the first of those provisions, of spirits and wines, stills and*

apparatus, owned by the offender, is evidently intended to take effect immediately upon the commission of the offense, so as to prevent any subsequent alienation by him before seizure and condemnation; and the words 'wherever found' merely preclude all limit of place, and have no tendency to postpone the time when the forfeiture shall take effect. In the second provision, the restriction to personal property 'found in the distillery,' or upon the premises of which it is part, is a limit of place only, and does not postpone the forfeiture of such property which is on the premises when the offense is committed; and from what date a forfeiture of personal property not on the premises at the time of the commission of the offence, but brought there afterwards, should take effect, this case does not require us to consider."

POINT XI.

The Court has abundant power to issue an appropriate writ and sustain an appropriate action.

Section 914, Revised Statutes, does not strictly apply, because there is no action of forfeiture known to the practice in the courts of record of the State of New York, and the section cannot be understood to contain anything except a direction that the Court should mould its process in similarity to that of the State court so far as it might be feasible.

Mexican Cent. R. R. v. *Pinkney*, 149 U. S., 194, 207.

Indianapolis R. R. Co. vs. *Horst*, 93 U. S., 291, 300.

Shephard vs. *Adams*, 168 U. S., 616, 626.

Phelps vs. *Oakes*, 117 U. S., 236, 239.
Schunk vs. *Moline*, 147 U. S., 500, 507.
Gumbel vs. *Pitkin*, 124 U. S., 150.

Section 716, Revised Statutes, broadly gives the Court that power.

Under this act the courts are not restricted to the kind of process used in the State courts or bound in any respect to conform themselves thereto.

U. S. Bank vs. *Halstead*, 10 Wheat., 51.
Swift & Co. vs. *Jones* (C. C. A., 4th Ct.), 145 F. R., 489.
Southern Pacific Co. vs. *Denton*, 146 U. S., 202, 208.

POINT XII.

The action was properly brought to secure condemnation and forfeiture of the goods, adapting the pleadings as far as might be to an action of replevin.

That kind of an action is suggested by the opinion of this Court in

Bolles v. *Outing Co.*, 175 U. S., 266.

Similar actions have been upheld with the exception of some decisions of the Third Circuit.

Hageman v. *Springer*, 110 F. R., 374;
Springer Lith. Co. v. *Falk*, 59 F. R., 707;
Morrison vs. *Pettibone*, 87 F. R., 330;
Childs vs. *N. Y. Times Co.*, 110 F. R., 527.

In the Third Circuit McPherson, *D. J.*, in two reported decisions, has come to the con-

clusion that the action of replevin as practiced in Pennsylvania was not an appropriate action to bring about a forfeiture of the infringing sheets. The courts below, however, have sustained the present action, not as an action of replevin, strictly, but as a direct proceeding to secure condemnation and forfeiture of the infringing articles. For the purpose of seizing the illegal sheets a writ of replevin, or a writ in the nature of a writ of replevin, is an appropriate remedy because it is issued upon affidavits substantiating the plaintiff's claim by proper allegations under oath. It is accompanied by a bond in total value of the articles to be seized. It is issued upon application to a Judge of the Court and it brings the article into court to be held until subsequent condemnation by a judgment of the Court, if the plaintiff's act is sustained by the proofs. As the plaintiff has an inchoate right of property in the article as soon as the wrong is committed, no good reason is apparent why a writ in the nature of replevin should not be resorted to. Neither is there anything in the words of the writs of replevin, which would be in conflict with the proceedings evidently contemplated by the statute.

POINT XIII.

Revised Statutes, Sec. 860, does not apply to evidence furnished by the issuing of and seizure under a writ of the Court.

U. S. v. *Hughes*, Fed. Cas., 15,417 (12 Blatchford, 553).

POINT XIV.

It was not a valid objection to the offering of the replevin proceedings as evidence at the trial, that the replevin was without authority.

Even illegal proceedings may furnish valid evidence.

Adams v. *New York*, 192 U. S., 597, affirming People *vs.* Adams, 176 N. Y., 351.

Bacon vs. *U. S.* (C. C. A., 1899), 97 F. R., 40.

POINT XV.

No objection to the offering of the replevin documents, upon the ground that replevin was not an appropriate remedy, was made at the trial. That objection was first raised upon defendant's motion for a new trial, after the verdict. That objection should be disregarded.

Proceedings upon a motion for a new trial and the denial thereof are not reviewable in this Court.

Springer Lith. Co. vs. *Falk*, 59 F. R., 707;

Southern Pacific vs. *Maloney*, 136 F. R., 171, and cases cited;

Railway Co. vs. *Heck*, 102 U. S., 120.

POINT XVI.

No error was committed by the Court in compelling the witness Wilson to testify.

The witness Wilson had testified that everything which he had done with reference to the pictures was done by him as an employee of the American Tobacco Company, and not in his individual capacity or interest. Under these circumstances and on the authority of Thornton *v.* Schreiber, above cited, he was free from all personal liability in the matter. He was therefore quite properly compelled to testify.

The rule against incriminating testimony is for the protection of the witness and not for that of other parties.

Brown vs. *Walker*, 161 U. S., 591, 597.
Hale vs. *Henkel*, 201 U. S., 43.

POINT XVII.

The plaintiff in error, being a corporation, cannot invoke the protection of the fourth and fifth amendments to the Constitution, so far as the execution of the writs of replevin is concerned.

Hale vs. *Henkel*, 201 U. S., 43.

POINT XVIII.

It was not error to receive in evidence the statement, Exhibit H.

Wilson, who was in charge of the defendant's curve cut department, had been asked by the company's counsel to prepare a statement as to the disposition of the posters claimed to be an infringement; and, while the writ was being executed, he went with the Marshal and the witness Schrenk through the defendant's office and several departments and prepared the statement, of which he voluntarily gave a press copy to Schrenk at the latter's request. The paper did not contain anything of importance, because proof of the defendant's possession of the infringing sheets was made by the returns to the writs, and proof of defendant's publication of the picture had been made in various ways, such as sending them to Ketcham, Deuther and others, and by the public exhibition of the pictures to everybody who had a chance to see them at the offices of the American Tobacco Company, and at Ketcham's store, and at the cigar store where the witness Eble saw the poster. It would, therefore, seem very immaterial whether the witness had personal knowledge of all the facts gathered by him and put into the statement handed to Parker and to Schrenk, and the receipt of the paper was within the usual rule that when information is furnished by a corporation upon inquiry it is not necessary to prove the authority of the person at the company's office who furnishes the information and apparently is clothed with authority to furnish it. The manager of a department in a corporation is the very person who, according to ordinary practice, is presumed to know about the details of the department under his supervision. Wilson had charge of these advertising posters, procured them, attended to their dis-

tribution. That the distribution of an advertisement is a publication cannot be denied, since the very object of that distribution is publication. Engaged in this business of distributing them, he made the statement which was part of the *res gestæ* and not a later recital of a previous fact. It was also a part of the *res gestæ*, because it directed plaintiff's lawyer, who accompanied the Marshal, to the Deuther Manufacturing Company, where another seizure was then immediately made.

Under any aspect, its admission would not constitute reversible error.

U. S. vs. *Shapleigh*, 54 F. R., 126, 137.

POINT XIX.

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

ANTONIO KNAUTH,
Of Counsel for Defendant in Error.

AMERICAN TOBACCO COMPANY *v.* WERCKMEISTER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 28. Argued October 30, 1907.—Decided December 2, 1907.

In construing a statute, while the court must gain the legislative intent primarily from the language used, it must remember the objects and purposes of the statute and the conditions of its enactment so as to effectuate rather than destroy the spirit of that intent.

The purpose of the copyright statute is not so much to protect the physical thing created as to protect the right of publication and reproduction, and the statute should be construed in view of the character of the property intended to be protected.

In the case of a painting, map, drawing, etc., the copyright notice required by § 4962 Rev. Stat. need not be inscribed upon the original article itself; the statute is complied with if the notice is inscribed upon the published copies thereof which it is desired to protect.

In the United States, property in copyright is the creation of Federal statute passed in the exercise of the power vested in Congress by Article I, § 8, of the Federal Constitution, to promote the progress of science and the useful

arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, and the statute should be given fair and reasonable construction to effect such purpose.

The Federal copyright statute recognizes the separate ownership of the right of copying from that which inheres in the physical control of the thing itself and gives to the assigns of the original owner of the right to copyright the right to take out copyright independently of the ownership of the article itself.

The property of an author or painter in his intellectual creation is absolute until he voluntarily parts therewith. While the public exhibition of a painting or statue where all can see and copy it might amount to a publication, where the exhibition is made subject to reservation of copyright and to restrictions rigidly enforced against copying, it does not amount to a publication.

In a suit brought in replevin under the New York Code to recover infringing copies of the plaintiff's copyrighted article it is too late to object to the form of remedy on the motion for new trial.

Adams v. *New York*, 192 U. S. 585, and *Hale* v. *Henkel*, 201 U. S. 43, followed to effect that defendant's rights under the Fourth and Fifth Amendments were not violated by the seizure of infringing copies of copyrighted articles or by the use thereof as evidence.

146 Fed. Rep. 375, affirmed.

THIS is a writ of error to the Circuit Court of Appeals for the Second Circuit, seeking reversal of a judgment affirming the judgment of the United States Circuit Court for the Southern District of New York in favor of the defendant in error, adjudging him to be entitled to the possession of 1196 sheets, each containing a copy of a certain picture called "Chorus," the same representing a company of gentlemen with filled glasses, singing in chorus. The painting was the work of an English artist, W. Dendy Sadler. The defendant in error claimed to be the owner of a copyright taken out under the laws of the United States.

The judgment was rendered under authority of § 4965, as amended March 2, 1895. 28 Stat. 965; 3 U. S. Comp. Stat. p. 3414.

In January, 1894, by agreement between the artist and Werckmeister, the defendant in error, it was agreed that the painting should be finished by March 1, and then sent to Werckmeister to be photographed and returned to Sadler in time to

exhibit at the Royal Academy in 1894. The painting was sent to Werckmeister at Berlin, where it was received on March 8, 1894, and was returned to Sadler in London on March 22, 1894. On April 2, 1904, the artist Sadler executed and delivered the following instrument:

"I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200. London, April 2, 1894. (Signed) W. DENDY SADLER."

Werckmeister was a citizen of the German Empire, doing business in Berlin, Germany, under the trade name of "Photographische Gesellschaft," and did business in New York city under the name of the "Berlin Photographic Company."

The Photographische Gesellschaft of Berlin, by letter dated March 31, 1894, received on April 16, 1894, deposited the title and description of the painting and a photograph of the same in the office of the Librarian of Congress, the intention being to obtain a copyright under the act of Congress. U. S. Comp. Stat., v. 3, p. 3407. After the painting was returned to London it was exhibited by Sadler at the exhibition of the Royal Academy at London, and was there on exhibition for about three months; the exhibition opening the first Monday of May and closing the first Monday of August, 1894. The exhibition was open to the public on week days from 8 A. M. to 7 P. M. upon the payment of the admission fee of one shilling, and during the last week was open evenings, the entrance charge being sixpence. There was a private view for the press on May 2, and on May 3 up to one o'clock, and the remainder of the day was for the Royal private view. There was also a general private view on May 4. The members and the associate members of the Royal Academy and the artists exhibiting at the exhibition and their families were entitled at all times to free admission, and they as well as the public visited the exhibition in large numbers.

During the time that the painting was shown at the exhibition it was not inscribed as a copyright, nor were any words

thereon indicating a copyright, nor on the substance on which it was mounted, nor on the frame, as required by the copyright act (3 U. S. Comp. Stat., p. 3411), if the original painting is within the requirements of the law in this respect.

The painting while on exhibition was for sale at the Royal Academy, but with the copyright reserved, which reservation was entered in the gallery sale book. The by-laws of the Royal Academy provided "that no permission to copy works on exhibition shall on any account be granted." The reasons for the by-law, as it appears upon minutes of the Academy, are as follows:

"That so much property in copyright being entrusted to the guardianship of the Royal Academy, the council feel themselves compelled to disallow, in future, all copying within their walls from pictures sent for exhibition."

The photogravures of the painting were placed on sale in June, 1894, or in the autumn of 1894; those photogravures were inscribed with the notice of copyright.

Mr. Sadler, the artist, afterwards, in October, 1899, sold the painting to a Mr. Cotterel, residing in London, England, since which time, so far as has been shown, it has been hanging in the dining room of the house of that gentleman.

On June 20, 1902, Werckmeister commenced an action, by the service of a summons, against the American Tobacco Company, plaintiff in error, and on the same day a writ of replevin was issued out of the Circuit Court of the United States for the Southern District of New York, directed to the marshal of the same district, requiring him to replevin the chattels described in an annexed affidavit. Under the writ the marshal seized upon the premises of the American Tobacco Company 203 pictures. On July 23, 1902, Werckmeister caused another writ of replevin to issue out of the same court, directed to the marshal of the Western District of New York, under which writ the marshal seized 993 pictures.

An amendment to the complaint set forth the seizure of the pictures. The copies seized were adjudged to be forfeited to the plaintiff Werckmeister and to be of the value of $1,010.

The judgment rendered in the Circuit Court was taken upon error to the United States Circuit Court of Appeals and there affirmed. 146 Fed. Rep. 373. The present writ of error is prosecuted to reverse the judgment of the Court of Appeals.

Mr. William A. Jenner for plaintiff in error:

Plaintiff below (defendant in error) had no right to maintain the action because of omission to give the notice of copyright prescribed by § 4962 on the original painting exhibited at the Royal Academy.

The statutory notice of copyright is most effectively given in the case of a painting when it is inscribed upon "some visible portion *thereof*, or of the substance on which the same shall be mounted." Every one who sees the painting sees that notice, or can see it, if he looks.

Inscription upon a copy and not upon the original is futile, if one sees only the original and does not see the copy. To be completely effective the notice should be inscribed upon copies as well as upon the original.

But in the case of a painting, there may be no copies, replicas or reproductions, and the author or proprietor may wish only to prevent copying and to preserve the painting unique. In that case, unless the statutory notice is inscribed upon the painting or its mount, no notice at all would be given. But the statute does not distinguish between those cases where the copyrightable thing, *i. e.* the painting, is kept unique and those cases where copies or reproductions are made. In both cases there must be compliance with the same requirements.

In the case at bar the *thing* copyrighted was the *painting*. Plaintiff's photogravure was not copyrighted at all and was protected only by virtue of the copyright of the painting.

Section 4962 should be construed so as to promote its apparent object, that is to require the notice to be inscribed upon the original painting. Its plain import is that the copies of every edition of the book published is to have a notice inserted in them; if a painting, the notice is to be inscribed upon

a visible portion of it or of its mount, without regard to publication.

Where the language is plain and unambiguous a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36; *Hadden* v. *Collector*, 5 Wall. 107, 111; *Scott* v. *Reid*, 10 Pet. 524, 527; *St. Paul &c. Ry. Co.* v. *Phelps*, 137 U. S. 528.

The primary rule is that a statute is to receive the meaning which the ordinary reading of its language warrants. *United States* v. *Fisher*, 2 Cranch. 386; *United States* v. *Hartwell*, 6 Wall. 395; *United States* v. *Wiltberger*, 5 Wheat. 95.

The exhibition at the Royal Academy was a publication of the painting. Published means made public.

The only way in which a painting or statue, a model or design can be published is by exhibition thereof to the public. If the public were admitted without restriction of number, the exhibition was in every sense a public exhibition.

Section 4965 cannot be enforced by an action in replevin. The writs of replevin and proceedings thereunder were unwarranted in law and illegal. Replevin under the New York Code of Civil Procedure is not adapted, and the Circuit Court is without authority to adapt or mold it, to proceedings for enforcing the forfeiture of infringing sheets accruing under Rev. Stat., § 4965.

Plaintiff's proceedings, therefore, were without authority of law, and the Circuit Court was without jurisdiction to try the action or render a judgment. *Falk* v. *Curtis Pub. Co.*, 107 Fed. Rep. 126; *Rinehart* v. *Smith*, 121 Fed. Rep. 148; *Gustin* v. *Record Pub. Co.*, 127 Fed. Rep. 603; *Hills* v. *Hoover*, 142 Fed. Rep. 904; *Morrison* v. *Pettibone*, 87 Fed. Rep. 330; *Walker* v. *Globe Newspaper Co.*, 130 Fed. Rep. 593.

Mr. Antonio Knauth for defendant in error:

The copyright statute does not require a notice on the original

painting, but only on every copy of every edition issued. *Werckmeister* v. *Pierce & Bushnell Co.*, 63 Fed. Rep. 455, and *Werckmeister* v. *Amer. Lithographic Co.*, 142 Fed. Rep. 827.

For the purposes of the present case it is immaterial whether or not the original picture is included in the words "in the several copies of every edition published," because clearly the statute cannot be construed to require a notice on the unpublished painting. The object of the statute requiring notice is to give notice to the public. The statutes refer only to the published edition, which is an edition offered to the public for sale or circulation. *Falk* v. *Gast Lith. & Eng. Co.*, 54 Fed. Rep. 890, 894 (Shipman, J.); *Burrow-Giles Lith. Co.* v. *Sarony*, 111 U. S. 53; *Snow* v. *Mast*, 65 Fed. Rep. 995; Am. & Eng. Enc. of Law, Vol. 7 (2d ed.), 555; *Thompson* v. *Hubbard*, 131 U. S. 123, 150; *Mifflin* v. *White*, 190 U. S. 260.

The action was properly brought to secure condemnation and forfeiture of the goods, adapting the pleadings as far as might be to an action of replevin. *Bolles* v. *Outing Co.*, 175 U. S. 266; *Hageman* v. *Springer*, 110 Fed. Rep. 374; *Springer Lith. Co.* v. *Falk*, 59 Fed. Rep. 707; *Morrison* v. *Pettibone*, 87 Fed. Rep. 330; *Childs* v. *N. Y. Times Co.*, 110 Fed. Rep. 527.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

This case involves important questions under the copyright laws of the United States, upon which there has been diversity of view in the Federal courts.

Before taking up the errors assigned it may aid in the elucidation of the questions involved to briefly consider the nature of the property in copyright which it is the object of the statutes of the United States to secure and protect. A copyright, as the term imports, involves the right of publication and reproduction of works of art or literature. A copyright, as defined by Bouvier's Law Dictionary, Rawles' edition, volume 1, p. 436, is: "The exclusive privilege, secured according to certain legal

forms, of printing, or otherwise multiplying, publishing and vending copies of certain literary or artistic productions." And further, says the same author, "the foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others." That is, the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.

There was much contention in England as to whether the common law recognized this property in copyright before the Statute of Anne; the controversy resulting in the decision in the House of Lords in the case of *Donelson* v. *Beckett*, 4 Burr, 2408, the result of the decision being that a majority of the judges, while in favor of the common law right, held the same had been taken away by the statute. See *Wheaton* v. *Peters*, 8 Pet. 591, 656; *Holmes* v. *Hurst*, 174 U. S. 82.

In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution in Art. I, § 8, "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." See *Wheaton* v. *Peters*, 8 Pet. 591, *supra; Banks* v. *Manchester*, 128 U. S. 244, 252; *Thompson* v. *Hubbard*, 131 U. S. 123, 151.

Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose.

The first question presented in oral argument and upon the briefs involves the construction of § 4962 Rev. Stat. as amended (18 Stat. 78; 3 U. S. Comp. Stat., 1901, p. 3411), which is as follows:

"That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz: 'Entered according to act of Congress, in the year ——, by A. B. in the office of the Librarian of Congress, at Washington;' or, at his option, the word 'copyright,' together with the year the copyright was entered and the name of the party by whom it was taken out, thus: 'Copyright 18—, by A. B.'"

It is the contention of the plaintiff in error that the original painting was not inscribed as required by the act, and therefore no action can be maintained, and it is insisted that the inscription upon the photogravures offered for sale is not sufficient.

It must be admitted that the language of the statute is not so clear as it might be, nor have the decisions of the courts been uniform upon the subject. In *Werckmeister* v. *Pierce & Bushnell Manf. Co.*, 63 Fed. Rep. 445, Judge Putnam held that the failure to inscribe the copyright notice upon the original painting did not effect the copyright. That judgment was reversed by the Circuit Court of Appeals for the First Circuit by a divided court. 72 Fed. Rep. 54.

In the case of *Werckmeister* v. *American Lithographic Co.*, 142 Fed. Rep. 827, Judge Holt reached the same conclusion as Judge Putnam, and in the case at bar the Circuit Court of Appeals for the Second Circuit approved of the reasoning of Judges Putnam and Holt and disagreed with the majority of

the judges of the Circuit Court of Appeals for the First Circuit.

Looking to the statute, it is apparent that if read literally the words "inscribed on some visible portion thereof," etc., apply to the antecedent terms "maps, charts, musical composition, print, cut, engraving, photograph, painting," etc., and the words of the first part of the sentence requiring notice to be inserted in the several copies of every edition published apply literally to the title page or the page immediately following, if it be a book.

But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But while seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained.

We think it was the object of the statute to require this inscription, not upon the original painting, map, photograph, drawing, etc., but upon those published copies concerning which it is designed to convey information to the public which shall limit the use and circumscribe the rights of the purchaser.

As we have seen, the purpose of the copyright law is not so much the protection of the possession and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought.

We have been cited to no case, nor can we find any direct authority in this court upon the question. But the opinion of Mr. Justice Miller in *Lithographic Company* v. *Sarony*, 111 U. S. 53, is pertinent. The court there considered whether Congress had the constitutional right to protect photographs and negatives by copyright, and the second assignment of

error relates to the sufficiency of the words "Copyrighted 1892 by N. Sarony," when the copyright was the property of Napoleon Sarony. In treating this question the learned judge used this very suggestive language (p. 55):

"With regard to this latter question, it is enough to say that the object of the statute is to give notice of the copyright to the public, by placing *upon each copy*, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained."

If the contention of the plaintiff in error be sustained the statute is satisfied only when the original map, chart, etc., or painting is inscribed with the notice, and this is requisite whether the original painting is ever published or not. We think this construction ignores the purpose and object of the act, which Mr. Justice Miller has said in the language just quoted, is to give notice of the copyright to the public—that is, to the persons who buy or deal with the published thing.

It is insisted that there is reason for the distinction in the statute between books, and maps, charts, paintings, etc., in that a book can only be published in print and becomes known by reading, while paintings, drawings, etc., are published by inspection and observation.

It may be true that paintings are published in this way, but they are often sold to private individuals and go into private collections, whilst the copies, photographs or photogravures, may have a wide and extended sale.

It would seem clear that the real object of the statute is not to give notice to the artist or proprietor of the painting or the person to whose collection it may go, who needs no information, but to notify the public who purchase the circulated copies of the existing copyright in order that their ownership may be restricted.

There does not seem to be any purpose in requiring that an original map, chart or painting shall be thus inscribed, while there is every reason for requiring the copies of editions pub-

lished to bear upon their face the notice of the limited property which a purchaser may acquire therein.

This construction of the statute which requires the inscription upon the published copies is much strengthened by the review of the history of copyright legislation which is contained in Judge Putnam's opinion in *Werckmeister* v. *Pierce & Bushnell Co.*, 63 Fed. Rep. 445; that legislation before the statute of 1874, in which paintings were for the first time introduced, shows the uniform requirement of notice upon copies. The apparent incongruities in the statute, in the light of its history, have grown up from enlarging the scope of the law from time to time by the introduction of new subjects of copyright and engrafting them on the previous statutes. The same argument which requires original paintings to be inscribed would apply to all other articles in the same class in the present law, as maps, charts, etc., which were formerly classed with books, so far as requiring notice upon copies is concerned.

Such original maps and charts, etc., may and usually do remain in the possession of the original makers, and there is no necessity for any notice upon them, but the copyright is invalid, as the plaintiff in error insists, unless the original is itself inscribed with the notice of copyright.

For the learned counsel for plaintiff in error says: "If the painting or like article is ripe for copyright, it is ripe for the inscription of the notice. The statute requires the inserting of notice in published things only in respect to published editions of books. The term 'published' is not used in connection with paintings, statues and the like." And it is urged there can be no such thing as an "edition" of a painting, and copies of published editions are the only copies mentioned in the statute. But this phrase survives from former statutes, which dealt only with books, maps, charts, etc. When paintings and other things not capable of publication in "editions" were introduced into the statute, the language was not changed so as to be technically accurate in reference to the new subjects of copyright.

But the sense and purpose of the law was not changed by this lack of verbal accuracy, and we think while the construction contended for may adhere with literal accuracy and grammatical exactness to the language used, it does violence to the intent of Congress in passing the law, and that the requirement of "inscription upon some visible portion thereof" should be read in connection with the first part of the sentence, which requires notice to be inserted in the several copies of every edition published, on the title page if it be a book, upon some visible portion of the copy if it be a map, chart, painting, etc.

As we have said in the beginning, the statute is not clear. But read in the light of the purpose intended to be effected by the legislation, we think its ambiguities are best solved by the constructions here given, and that the Circuit Court of Appeals made no error in this respect.

Again, it is contended that under the facts stated Werckmeister was but the licensee of Sadler, and as such not within the terms of the statute (§ 4952 as amended 1891, 26 Stat. 1107; 3 U. S. Comp. Stat., p. 3406), which is as follows:

"The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statutary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same; and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States."

But we think the transfer in this case accomplished what it

was evidently intended to do, a complete transfer of the property right of copyright existing in the picture. There is no evidence of any intention on the part of Sadler to retain any interest in this copyright after the sale to Werckmeister; and when the painting was offered for sale at the Royal Academy it was with a reservation of the copyright.

It would be giving an entirely too narrow construction to this instrument to construe it to be a mere license or personal privilege, leaving all other rights in the assignor. That it was the purpose of the parties to make a complete transfer is shown by the instrument executed when read in the light of the attendant circumstances.

In this connection it is argued that under the statute above quoted (§ 4952 as amended March 3, 1901), an author cannot, before publication, assign the right or privilege of taking a copyright independent of the transfer of the copyrightable thing itself, and it is contended that the terms author, inventor, designer, refer to the originator of the book, map, chart, painting, etc., and that the term "proprietor" refers to the person who has a copyrightable thing made for him under such circumstances as to become the proprietor, as, for instance, one who causes a digest to be compiled or a picture to be painted.

But we think this statute must be construed in view of the character of the property intended to be protected. That it was intended to give the right of copyright to others than the author, inventor or designer is conclusively shown in the use of the terms "proprietor" and "assigns" in the statute.

It seems clear that the word "assigns" in this section is not used as descriptive of the character of the estate which the "author, inventor, designer or proprietor" may acquire under the statute, for the "assigns" of any such person, as well as the persons themselves, may, "upon complying with the provisions of this chapter," have the sole liberty of printing, publishing and vending the same. This would seem to demonstrate the intention of Congress to vest in "assigns," before copyright, the same privilege of subsequently acquiring complete

statutory copyright as the original author, inventor, designer or proprietor has. Nor do we think this result is qualified because the statute gives to assigns, together with the right of publishing, vending, etc., the right of "completing, executing and finishing" the subject-matter of copyright.

And a strong consideration in construing this statute has reference to the character of the property sought to be protected. It is not the physical thing created, but the right of printing, publishing, copying, etc., which is within the statutory protection. While not in all respects analogous, this proposition finds illustration in *Stephens* v. *Cady*, 14 How. 528, in which it was held, where the copyright for map had been taken out under the act of Congress, a sale upon execution of the copperplate engraving from which it was made did not pass the right to print and sell copies of the map. Mr. Justice Nelson, delivering the opinion of the court, said (p. 530):

"But from the consideration we have given to the case, we are satisfied that the property acquired by the sale in the engraved plate, and the copyright of the map secured to the author under the act of Congress, are altogether different and independent of each other, and have no necessary connection. The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar* v. *Taylor*, 4 Burr, 2396, 'a property in notion, and has no corporeal tangible substance.' "

And the same doctrine was thus stated by Mr. Justice Curtis in *Stevens* v. *Gladding*, 17 How. 447, 452:

"And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other."

While it is true that the property in copyright in this country is the creation of statute, the nature and character of the

property grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself, and the statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work. We think every consideration of the nature of the property and the things to be accomplished supports the conclusion that this statute means to give to the assigns of the original owner of the right to copyright an article the right to take out the copyright secured by the statute, independently of the ownership of the article itself.

It is further contended that the exhibition in the Royal Gallery was such a publication of the painting as prevents the defendant in error from having the benefit of the copyright act. This question has been dealt with in a number of cases, and the result of the authorities establishes, we think, that it is only in cases where what is known as a general publication is shown, as distinguished from a limited publication under conditions which exclude the presumption that it was intended to be dedicated to the public, that the owner of the right of copyright is deprived of the benefit of the statutory provision.

Considering this feature of the case, it is well to remember that the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same. One or many persons may be permitted to an examination under circumstances which show no intention to part with the property right, and it will remain unimpaired.

The subject was considered and the cases reviewed in the analogous case of *Werckmeister* v. *The American Lithographic Company*, 134 Fed. Rep. 321, in a full and comprehensive opinion by the late Circuit Judge Townsend, which leaves little to be added to the discussion.

The rule is thus stated in Slater on the Law of Copyright and Trademark (p. 92):

"It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself

among the public, as to justify the belief that it took place with the intention of rendering such work common property."

And that author instances as one of the occasions that does not amount to a general publication the exhibition of a work of art at a public exhibition where there are by-laws against copies, or where it is tacitly understood that no copying shall take place, and the public are admitted to view the painting on the implied understanding that no improper advantage will be taken of the privilege.

We think this doctrine is sound and the result of the best considered cases. In this case it appears that paintings are expressly entered at the gallery with copyrights reserved. There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place.

Starting with the presumption that it is the author's right to withhold his property, or only to yield to a qualified and special inspection which shall not permit the public to acquire rights in it, we think the circumstances of this exhibition conclusively show that it was the purpose of the owner, entirely consistent with the acts done, not to permit such an inspection of his picture as would throw its use open to the public. We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect. But such is not the present case, where the greatest care was taken to prevent copying.

It is next objected that the form of action in this case was the ordinary action for replevin under the New York Code, and as the plaintiff did not have the right of property or possession before the beginning of this action, no such action would lie. Whether this action was the one in the nature of replevin for the seizures of the plates and copies indicated in the case of *Bolles* v. *Outing Company*, 175 U. S. 262, 266, we do not find it necessary to determine. After verdict, and upon motion for

a new trial, plaintiff in error, defendant below, moved to set aside the verdict "On the ground that replevin under the statutes of the State of New York is not an appropriate remedy or a lawful and legal remedy for taking possession of the alleged incriminating sheets or pictures, and that the proceedings taken in that behalf by the plaintiff were illegal and invalid, and that the plaintiff cannot avail of any benefit of that proceeding, and the introduction in evidence of the replevin proceedings was an error." The motion was denied and exception duly taken.

The learned counsel for the plaintiff in error admits that this question was not formally raised until the defendant's motion for a new trial, but maintains that the same question was raised by the objection to admission in evidence of the replevin proceedings by the marshal for the Western and Southern Districts of New York respectively.

Examining this record, it is perfectly apparent that no objection was made to the form of the action until it was embodied after verdict, in the motion for a new trial. Upon the admission of the writ of replevin, addressed to the marshal of the Western District of New York, and affidavit, the objection stated was "on the ground that the process of replevin that was executed by the marshal in Buffalo was an invasion of defendant's constitutional right, was an unwarrantable search, an illegal act, and nothing done under it, or information obtained by virtue of it, can be used in evidence against defendant under the Fourth and Fifth Amendments of the United States Constitution."

The same objection was made when the writs of replevin, affidavit and return were offered in evidence concerning the Southern District of New York, and it was said: "Defendant's counsel objects on the same grounds as stated in the introduction of the stipulation, namely, that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and plaintiff cannot avail of them as evidence in this case, on account of their illegality."

The argument which followed, could it be assumed to broaden the objection, was far from complaining of the form of action as such, but rested upon the Constitution and the character of the seizure of the goods of which it was maintained the plaintiff was not entitled to possession until after a judgment of forfeiture.

The record shows that the objection to the form of the remedy was first taken in any adequate way upon the motion for a new trial when it was too late.

In conclusion, it was suggested rather than argued that the constitutional rights of the plaintiff in error were violated by the seizure of the goods, and reference was made to the Fourth and Fifth Amendments. We think we need only refer in this connection to *Adams* v. *New York*, 192 U. S. 585, 597, and *Hale* v. *Henkel*, 201 U. S. 43.

Finding no error in the judgment of the Circuit Court of Appeals, the same is

Affirmed.